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ABSTRACT

The Education Law Association's yearbook of education law provides lawyers, administrators, and professors with a comprehensive review and analysis of the previous year's state and federal court decisions and legislation affecting the operation, management, and governance of public elementary and secondary schools, higher education, and international education. The 2000 yearbook contains 11 chapters, each covering a separate education law topic authored by an expert in that area. The major topics covered as follows: Employees, school governance, pupils, bargaining, students with disabilities, torts, sports, higher education, students in higher education, federal and state legislation, non-education related (cases having implications for educators), and international law, including cases and legislation from Australia, Canada, England and Wales, Europe, Great Britain, New Zealand, and South Africa. The yearbook includes a table of cases and a list of cases by jurisdiction. (Contains an index). (PKP)

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THE YEARBOOK OF EDUCATION LAW 2000

CHARLES J. RUSSO

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THE YEARBOOK
OF
EDUCATION LAW
2000

Edited by

CHARLES J. RUSSO

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DAYTON, OHIO

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Introduction

Almost one hundred and seventy cases involving K-12 education were reported last year. Although the Supreme Court did not hand down any decisions directly involving school staff in 1999, past decisions have influenced recent case law. Important precedent-setting rulings from past years are cited where appropriate. Litigation that is more properly the subject of other chapters is excluded as are disputes focusing primarily on procedural matters. Consistent with the pattern of previous years, the majority of cases in this chapter examine dismissal, nonrenewal, demotion, and discipline as many of these disputes addressed school compliance with district and state policies.

Discrimination in Employment

Discrimination claims can arise under state or federal statutes. Even so, the vast majority of cases in this section were litigated under federal law. The most commonly applied statute, title VII of the Civil Rights Act of 1964,[1] prohibits public and private educational institutions from discriminating on the basis of race, color, religion, sex, and/or national origin. Discrimination on the basis of national origin and race is also forbidden by section 1981 of the Civil Rights Act of 1866.[2] The Americans with Disabilities Act (ADA) applies to employers, public entities, and public accommodations.[3] Suits continue to be brought under section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified individuals."[4] Gender-based discrimination, including sexual harassment, is proscribed by title IX of the Educational Amendments of 1972,[5] while gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[6] Employees who are over forty years of age or older are safeguarded by the Age Discrimination in Employment Act of 1973 (ADEA).[7] Discrimination claims can also be pursued under section 1983 of the Civil Rights Act of 1871 which protects federal constitutional and statutory rights.[8] More recently, litigation has emerged under the Family Medical Leave Act .[9]

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[1] 42 U.S.C. §§ 2000 et seq.
[2] 42 U.S.C. § 1981.
[3] 42 U.S.C. §§ 12101 et seq.
[4] 29 U.S.C. § 794.
[5] 20 U.S.C. §§ 1681 et seq.
[6] 29 U.S.C. § 206(d)(1).
[7] 29 U.S.C. §§ 621 et seq.
[8] 42 U.S.C. § 1983.
[9] 29 U.S.C. §§ 2611 et seq.

Three cases that do not fit into the designated categories deserve some attention. In a case of first impression, a federal trial court in Ohio held that a teacher who claimed that his contract was not renewed based on his sexual orientation was entitled to have his suit resolved pursuant to the traditional level of scrutiny under Equal Protection. Under this lowest of the three levels of scrutiny, the others being strict and intermediate scrutiny, the court pointed out that the school board failed to articulate a rational basis for the nonrenewal. In light of the board's failure to offer a reasonable basis for acting, the court inferred a discriminatory animus.[10]

An appellate court in Pennsylvania found that the state's Veteran's Preference Act (VPA) was inapplicable as to an applicant for a teaching job because the test was administered by the school board. In reversing a grant of summary judgment in favor of the applicant, the court explained that the VPA, which gives veterans ten extra points on qualifying tests, applies only when a test is administered by the Civil Service Commission.[11]

The federal trial court in Nebraska dismissed a claim under the state's Fair Employment Practice Act. The court ascertained that, pursuant to the Act, once the administrative review process has been exhausted, a claim can only be brought in a state court.[12]

Race

African-American employees lost most of their claims. A black high school teacher in Massachusetts with twenty-two years of service who was fired for handing a lewd document to a female student failed to demonstrate that his dismissal was based on race. The First Circuit affirmed that discipline for three white teachers that had not involved dismissal was not inappropriate for the teacher because his misconduct was different.[13]

The Second Circuit affirmed that the dismissal of a black elementary school principal in New York City was based on nondiscriminatory grounds. The court determined that the board's reasons, failure to discharge administrative responsibilities, to achieve discipline in school, and to achieve a higher performance level for students, were neutral and nonpretextual.[14]

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[10] Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp.2d 1160 [130 Educ. L. Rep. 661] (S.D. Ohio 1998).

[11] Zablow v. Board of Educ. of Sch. Dist of Pittsburgh, 729 A.2d 124 [134 Educ. L. Rep. 526] (Pa. Commw. Ct. 1999).

[12] Lampman v. McCook Pub. Sch., 54 F. Supp.2d 945 [137 Educ. L. Rep. 293] (D. Neb. 1999).

[13] Conward v. Cambridge Sch. Comm., 171 F.3d 12 [133 Educ. L. Rep. 367] (1st Cir. 1999).

[14] Joseph v. New York City Bd. of Educ., 171 F.3d 87 [133 Educ. L. Rep. 380] (2d Cir. 1999).

A black music teacher in Missouri who was hired by a band boosters association to assist with a public school marching band could not maintain his section 1983 claim alleging racially discriminatory treatment where he failed to produce evidence that he suffered from racial harassment under a district policy or custom. The Eighth Circuit affirmed that isolated comments by the band director and one remark by the high school principal did not support the teacher's claim that the district had a policy endorsing racial harassment.[15]

In Pennsylvania, a federal trial court dismissed the complaint of a black custodian who alleged that she had been constructively discharged based on her race. The court was not convinced that the custodian established one of the elements of her prima facie case, namely that she performed her job satisfactorily.[16]

According to an appellate court in Ohio, a black custodian failed to state a race discrimination claim based on isolated comments by her white supervisor. As such, the court affirmed the dismissal of the custodian's complaint in asserting that references to her as "Aunt Jemima" and disparaging remarks about African-Americans on welfare were not only isolated comments but also that the statements were not connected to any adverse employment decision.[17]

In New Jersey, a black female school guidance counselor whose contract unsuccessfully filed a race discrimination suit. An appellate court upheld a grant of summary judgment in favor of a white male principal who used the word "teachable" concerning the counselor. The court declared that even though more appropriate words were available, the principal's comment that the counselor needed to be more teachable, in the sense of receiving directions or advice, did not connote racial animus.[18]

On the other hand, a federal trial court in New York City was satisfied that a black male teacher who was allegedly discharged for participating in a protest over the dismissal of another black teacher had an actionable claim for retaliation under title VII. The court rejected the board's argument that the teacher's being discharged for unsatisfactory work performance dispelled the possibility of retaliatory dismissal where he produced evidence of disparate treatment by the school's administration.[19]

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[15] Artis v. Francis Howell North Band Booster Ass'n,161 F.3d 1178 [131 Educ. L. Rep. 23] (8th Cir. 1998).

[16] Stove v. Philadelphia Sch. Dist., 58 F. Supp.2d 598 [138 Educ. L. Rep. 209] (E.D. Pa. 1999).

[17] Brewer v. Cleveland City Schools Bd. of Educ., 701 N.E.2d 1023 [130 Educ. L. Rep. 865] (Ohio Ct. App. 1997).

[18] Williams v. Pemberton Township Pub. Sch., 733 A.2d 571 [136 Educ. L. Rep. 934] (N.J. Super. Ct. App. Div. 1999).

[19] Copeland v. Rosen, 38 F. Supp.2d 298 [133 Educ. L. Rep. 885] (S.D.N.Y. 1999).

Three cases involved reverse discrimination. The Fifth Circuit reversed a title VII verdict in favor of a white clerical employee from Louisiana who alleged that she was the victim of reverse discrimination in rank and compensation. The court noted that the employee had the burden of proving that the district's bases for taking an adverse employment action against her were pretextual and that, in the absence of maintaining her burden, no reasonable jury could have concluded that she was the victim of discriminatory conduct.[20]

In Mississippi, a white school district business manager who was fired failed to bear her burden of proof that the board's reason for terminating her contract was pretextual. In granting the board's motion for summary judgment, a federal trial court accepted its claim that school officials acted in light of the district's worsening fiscal condition. The court posited that the business manager's allegations she was dismissed as part of the governor's plan to curry favor with black voters was unsupported by evidence and was too speculative to overcome the district's nondiscriminatory reasons.[21]

A federal trial court in Georgia rejected a white female's claim under section 1981 and title VII that a school board's selection of a black male as an assistant superintendent was based on race. The court acknowledged that the board had a neutral, non-pretextual basis for hiring the black male since, unlike the female, he had a general administrative background rather than experience only as a building principal.[22]

In one unusual case, the failure of a school board and superintendent in Louisiana to follow desegregation-ordered procedures in appointing a principal subjected both to civil contempt. A federal trial court decreed that neither the board nor the superintendent were shielded by qualified immunity and that the appointed principal should be removed from the job and replaced by someone who conformed with the requirements of its order.[23]

Religion

A Junior Reserve Officers' Training Corps (JORTC) instructor in Texas who received an unsatisfactory performance evaluation because he would not work between sunset on Friday and sunset on Saturday due to religious beliefs lost in his title VII claim of religious discrimination. A federal trial court was of the opinion that the school board met its burden of showing that alternative forms of accommodation would have created an undue hardship since officials could not force other employees to work against their wishes in order to cover all of the instructor's duties. The court contended that where one of the instructor's responsibilities was to attend Friday night football games and fellow staff members voluntarily agreed to perform some, but not all, of his duties, the district supported its position that his refusal to work was becoming disruptive to the JROTC program.[24]

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[20] Baltazor v. Holmes, 162 F.3d 368 [131 Educ. L. Rep. 37] (5th Cir. 1998).

[21] Vance v. North Panola Sch. Dist., 31 F. Supp.2d 545 [132 Educ. L. Rep. 92] (N.D. Miss. 1998).

[22] Walton v. Dougherty County Sch. Sys., 59 F. Supp.2d 1297 [138 Educ. L. Rep. 346] (M.D. Ga. 1997).

[23] Rambo v. Morehouse Parish Sch. Bd., 37 F. Supp.2d 482 [133 Educ. L. Rep. 496] (W.D. La. 1999).

Sex

Cases in this section address the liability of school boards for sexual harassment. It is important to note that a school board's having a nondiscriminatory policy can affect its liability. Relying on *Faragher v. City of Boca Raton,*[25] a federal trial court in Florida judged that a board was not vicariously liable for a principal's sexual harassment of a teacher since it promulgated an anti-harassment policy and she failed to take advantage of its grievance procedures.[26]

A second federal trial court in Florida indicated that abusive behavior by a female teacher toward a male teacher with whom she had a sexual relationship did not necessarily create an actionable claim for sexual harassment where the basis for the behavior was personal animosity, not gender. In rejecting the male's title VII sexual harassment charge, the court reasoned that physical and verbal abuse resulting from the rejected female's former intimate place in his life was not based on gender.[27]

As illustrated by a case from Illinois, a sexual harassment claim can be offset by a nondiscriminatory rationale. A female teacher in a program for emotionally disturbed and behaviorally disordered children failed to prove that she was discharged in retaliation for filing a title VII hostile environment claim. In dismissing the teacher's complaint, a federal trial court observed that a male coworker's alleged conduct of staring at her while she was teaching, touching her knee five times and her shoulder ten times, standing too close to her, and questioning her about her weekends was insufficiently severe and persuasive to support the title VII action. The court added that the school had a nondiscriminatory basis for dismissing the teacher in light of her repeated tardiness and lack of professionalism evidenced by inappropriate attire at work.[28]

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[24] Bynum v. Ft. Worth Indep. Sch. Dist., 41 F. Supp.2d 641 [134 Educ. L. Rep. 860] (N.D. Tex. 1999).

[25] 544 U.S. 775 (1998).

[26] Masson v. School Bd. of Dade County, Fla., 36 F. Supp.2d 1354 [133 Educ. L. Rep. 489] (S.D. Fla. 1999).

[27] Succar v. Dade County Sch. Bd., 60 F. Supp.2d 1309 [138 Educ. L. Rep. [427] (S.D. Fla. 1999).

In a case from Colorado, the Tenth Circuit affirmed a grant of summary judgment in favor of a board where a former school secretary who was suspended for accusing various officials of bias, untrustworthiness, and retaliatory conduct filed a title VII retaliation claim. The court was of the view that the secretary failed to show that the district's basis for punishing her disruptive behavior was pretextual. Further, the court ordered the secretary to pay the attorney fees of individual defendants because she was not substantially successful on her exemplary damages claim.[29]

Harassment claims must be connected to employment benefits in order to be justiciable. In Maryland, a nonteaching employee in a school district's central office failed to demonstrate a prima facie case of sexual harassment under title VII even though she allegedly was subjected to sexually harassing conduct by her supervisor. In granting the board's motion for summary judgment, the federal trial court agreed that the employee failed to produce evidence that her reaction to her supervisor's alleged sexual advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment.[30]

The Fifth Circuit affirmed the dismissal of title VII sexual harassment claims by two female teachers in Texas who received a series of anonymous romantic and/or vulgar letters. The teachers alleged that the letters were written by their principal and that the district acted inappropriately in correcting a hostile environment. The Fifth Circuit believed that while the teachers received the letters at their homes, they did not produce evidence that they were threatening or undermined their work performance. The court also wrote that the principal's reassigning the two teachers to other teaching duties was not a remediable tangible employment action because they were unable to connect the letters to their reassignments.[31]

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[28] Lindblom v. Challenger Day Program, 37 F. Supp.2d 1109 [133 Educ. L. Rep. 831] (N.D. Ill. 1999).

[29] Robbins v. Jefferson County Sch. Dist. R-1, 186 F.3d 1253 [137 Educ. L. Rep. 489] (10th Cir. 1999).

[30] Francis v. Board of Sch. Comm'rs of Baltimore, 32 F. Supp.2d 316 [132 Educ. L. Rep. 131] (D. Md. 1999).

[31] Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263 [130 Educ. L. Rep. 1070] (5th Cir. 1999).

In a state case of first impression, the Supreme Court of Alabama applied the same-sex employment discrimination test enunciated in *Oncale v. Sundowner Offshore Services*[32] to teacher-student misconduct. In affirming a grant of summary judgment in favor of a school board, the court also applied the deliberate indifference test from *Gebser v. Lago Vista Independent School District*[33] and held that the student failed to produce evidence to meet that standard.[34]

A case from Alabama illustrates the principle that a release from a claim does not always prohibit a suit based on sexual discrimination. A female physical education teacher who signed a release of potential claims with her school board over her pay under a salary schedule was still able to sue for pay disparity after the date that she signed the release. A federal trial court in Alabama interpreted the release as a contract that did not apply to acts after the release date.[35]

Age

A federal trial court denied a religious school's motion for summary judgment on the ground that the ADEA was inapplicable based on a ministerial exception. The court agreed that while persons who perform the functions of clergy are not be covered by ADEA, the teacher at issue was not an ordained member of the clergy, did not teach secular subjects, and did not lead in religious worship services.[36]

In Ohio, an appellate court remarked that a parochial school's dismissal of a husband and wife team, teachers who aged forty-six and fifty-five respectively, did not preclude an age discrimination claim. The court reflected that there would not be an impermissible intrusion into the school's religious beliefs in inquiring whether its basis for dismissal, religious incompatibility, was a pretext for age discrimination.[37]

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[32] 523 U.S. 75 (1998).

[33] 524 U.S. 274 [125 Educ. L. Rep. 1055] (1998).

[34] H.M. and M.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 [130 Educ. L. Rep. 952] (Ala. 1998).

[35] Blalock v. Dale County Bd. of Educ., 33 F. Supp.2d 995 [132 Educ. L. Rep. 476] (M.D. Ala. 1998).

[36] Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp.2d 849 [134 Educ. L. Rep. 900] (S.D. Ind. 1998).

[37] Basinger v. Pilarczyk, 707 N.E.2d 1149 [133 Educ. L. Rep. 240] (Ohio Ct. App. 1997).

An age discrimination claim requires an adverse employment decision in order to be justiciable. The Tenth Circuit, in a case from Colorado, affirmed that a fourth grade teacher who was transferred to another school to teach second grade did not experience an adverse employment action sufficient to permit her to maintain age and gender claims. In upholding a grant of summary judgment in favor of the board, the court maintained that absent an adverse employment action, the teacher could not meet one of the requirements for a prima facie case.[38]

Nonpretextual reasons can defeat an age discrimination claim. A appellate court in Massachusetts upheld the nonrenewal of a mathematics teacher's contract on the ground of collegiality. Even though the teacher stated a prima facie case under the state's age discrimination law, the court agreed that the district's rationale was not pretextual.[39]

A Maryland teacher's unsubstantiated claim that a school board concocted a plan to force older staff to retire and to replace them with younger, less expensive teachers was insufficient to refute the board's reason for his dismissal. The federal trial court was persuaded that the board's motive for the terminating the teacher's employment was not pretextual since he unsuccessfully challenged his dismissal for incompetence during administrative review.[40]

In the first of two cases where age discrimination claims were successful, the Seventh Circuit upheld a damages award to teachers in Indiana who delayed their acceptance of an early retirement incentive plan that treated those who retired at fifty-eight more favorably than those who retired at sixty-one. Where retirement benefits were based solely on age at retirement, rather than a nondiscriminatory factor such as number of years of service, the court agreed that the teachers established a prima facie claim under ADEA.[41]

The federal trial court in Puerto Rico was satisfied that while a former teacher who was unable to establish discrimination claims under the ADEA and ADA did raise retaliation charges under both statutes. The court offered that the anti-retaliation provisions in both the ADEA and ADA reach beyond ultimate employment decisions and applied to interference with the teacher's appeals before the Industrial Commission and to his receiving unfavorable job references.[42]

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[38] Sanchez v. Denver Pub. Sch., 164 F.3d 527 [131 Educ. L. Rep. 679] (10th Cir. 1998).

[39] Bruce v. Town of Wellesley, 716 N.E.2d 670 [137 Educ. L. Rep. 788] (Mass. Ct. App. 1999).

[40] Moore v. Board of Educ. for Talbott County, 63 F. Supp.2d 667 [138 Educ. L. Rep. 1098] (D. Md. 1999).

[41] Solon v. Gary Community Sch. Corp., 180 F.3d 844 [136 Educ. L. Rep. 170] (7th Cir. 1999).

National Origin

Where a school board raised the Eleventh Amendment as a defense to a title VII suit, a federal trial court commented that such an action was not precluded because districts in Kentucky are not arms of the state. However, the court ascertained that the board was not liable for changes in a teacher's duties where nondiscriminatory reasons, namely budget cuts and modifications in federal regulations, accounted for the new assignments.[43]

A federal trial court in New York mandated that a parochial school is not exempt from scrutiny under title VII except where such an inquiry is prohibited by the Free Exercise Clause regarding an employee's performing religious functions. Additionally, the court was convinced that the exemption was inapplicable to claims of reverse racial and national origin discrimination. Even so, a white woman who was assigned to teach a lower grade that she considered undesirable unsuccessfully claimed reverse discrimination where, following her resignation, she failed to produce credible evidence that the school had a pattern of filling vacant teaching positions with non-whites of Hispanic origin. Absent evidence of a lack of uniformity in its treatment of non-whites, the court determined that the school was entitled to a grant of summary judgment.[44]

Disability

In a case of first impression following the Supreme Court handed down *Sutton v. United Airlines* [45] and *Murphy v. United Parcel Service*,[46] the Third Circuit ruled that the claim of a school secretary in Pennsylvania could go to trial as to whether her bipolar disorder substantially limited a major life activity while she was taking lithium. The court decided that even though

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[42] Vicenty Martell v. Estado Libre Asociado De Puerto Rico, 48 F. Supp.2d 81 [136 Educ. L. Rep. 229] (D. Puerto Rico).

[43] Ghassomians v. Ashland Indep. Sch. Dist., 55 F. Supp.2d 675 [137 Educ. L. Rep. 535] (E.D. Ky. 1998).

[44] Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp.2d 249 [135 Ed. L. Rep. 48 (E.D.N.Y. 1999).

[45] 119 S.Ct. 2139 (1999).

[46] 119 S.Ct. 2133 (1999).

Sutton and *Murphy* dealt with whether an employee had a disability, they did not affect this set of facts over a school district's notice of disability and reasonableness of accommodations. The court pointed out that under the ADA, an employer is required to engage in a interactive process with an employee once it knows about a disability, but cannot be faulted for not providing accommodations if the staff member fails to supply information.[47]

The Ninth Circuit reversed in favor of a former school janitor from Nevada who presented a triable issue as to whether he was disabled due to carpal tunnel syndrome and whether the board should have offered him a position as a safety aide as a reasonable accommodation. The court found that even though the board was not required to create a new job for him, there was a genuine issue of fact as to whether the janitor was qualified for the preexisting safety aide position.[48]

In Indiana, a federal trial court declared that where a teacher with a disabling vision condition was reassigned to an elementary school, the district was not responsible for the alleged breakdown of the interactive accommodation process. The court was satisfied that the board provided an accommodation, including an aide and exemption from cafeteria and playground duty, based on the teacher's representations.[49]

A dispute from Mississippi illustrates the principle that an employee must provide information to an employer. The Fifth Circuit upheld a grant of summary judgment in favor of a school board that nonrenewed the contract of a teacher who had a disabling kidney disorder. The court ruled that while the district knew about the disability, its obligation was to accommodate the teacher's limitation, not the disability. The court explained that accommodations under the ADA require a teacher to notify the board of her limitation since "the ADA does not require an employer to assume that an employee with a disability suffers from a limitation."[50]

Another basic principle under the ADA is that a person must meet the statutory definition of a disability in order to have a justiciable claim. A former guidance counselor in New York unsuccessfully filed an ADA claim alleging that she was discharged because of her mental impairment. A federal trial court in New York posited that since the counselor's depression, panic attacks, and dermatological symptoms associated with stress did not substantially limit a major life activity, she was not disabled within the meaning of ADA.[51]

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[47] Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 [137 Educ. L. Rep. 116] (3d Cir. 1998).

[48] Wellington v. Lyon County Sch. Dist., 187 F.3d 1150 [137 Educ. L. Rep. 890] (9th Cir. 1999).

[49] Salmon v. West Clark Community Sch., 64 F. Supp.2d 850 [139 Educ. L. Rep. 273] (S.D. Ind. 1999).

[50] Gammage v. West Jasper Sch. Bd. of Educ., 179 F.3d 952 [136 Educ. L. Rep. 131] (5th Cir. 1999).

In Michigan, a federal trial court noted that a teacher whose contract was terminated for insubordination failed to state a claim that his dismissal resulted from a perception of a disability under the ADA. The court concluded that expressions of concern for the teacher's mental health and a request that he undergo a psychological examination were insufficient to classify him as disabled "because of a perception that he had a mental impairment." In granting the school board's motion for summary judgment, the court observed that it provided nondiscriminatory reasons evidencing insubordination.[52]

An appellate court in Maryland affirmed that a transportation assistant who was diagnosed with somatization disorder and major depression due to long hours of work was ineligible for stress-related worker's compensation. The court rejected the assistant's claim in contending that the stress was not due to the nature of an employment in which hazards of the occupational disease were characteristic. The court was also of the opinion that the assistant presented evidence that the stress-related illnesses were inherent in the nature of her job.[53]

Employees cannot make one set of claims about their disabilities to their employers and a different set in workers' compensation and social security disability hearings. For example, where a former head custodian in New York, in qualifying for workers' compensation and social security, claimed that he could not stand, he was estopped from filing suit under the ADA charging that school district officials failed to accommodate his disability. In affirming a grant of summary judgment in favor of the board, the Second Circuit agreed that the custodian lacked a qualifying disability because standing was an essential function of his job.[54]

Disabilities can be related to safety. The Fifth Circuit upheld a damages award and attorney fees to a child care driver in Texas who was demoted because of impaired hearing. The court acknowledged that, under the ADA, the employer bore the burden of proving that the driver's disability represented a safety hazard to the children being transported. In the absence of any problems, such as previous accidents or near misses, the court agreed that speculation about the risks associated with the disability was insufficient to remove the driver from her job.[55]

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[51] Mescall v. Marra, 49 F. Supp.2d 365 [136 Educ. L. Rep. 314] (S.D.N.Y. 1999).

[52] Sullivan v. River Valley Sch. Dist., 20 F. Supp.2d 1120, 1125 [130 Educ. L. Rep. 653] (W.D. Mich. 1998).

[53] King v. Board of Educ. of Prince George's County, 731 A.2d 460 [135 Educ. L. Rep. 559] (Md. Ct. Spec. App. 1999).

[54] Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1 [138 Educ. L. Rep. 82] (2d Cir. 1999).

Substantive Constitutional Rights

Speech

In an unusual case, a coach's failure to select a student for a varsity basketball team escalated into a major conflict when the district superintendent sent his father a letter barring him from school property except for public events. A federal trial court in Virginia dismissed the father's allegation that the superintendent violated his right to free speech. The Fourth Circuit affirmed that the dismissal was proper since the complaint represented a frivolous attempt to advance a federal claim in order to litigate a state charge over the father's right to complain about the school board.[56]

The single most litigated issue concerning free speech is whether remarks are on matters of public concern. In a case with significant free speech implications, the Fifth Circuit reversed a grant of summary judgment on behalf of a board in Texas that transferred two teachers. The court indicated that criticisms two teachers on a site based management team voiced about their principal's failure to implement a school improvement plan constituted speech on a matter of public concern. Not only did the court interpret the transfers as being carried out in retaliation for the teachers' exercise of their right to free speech, but it also discerned that the superintendent and board of trustees were not entitled to qualified or absolute immunity. The court reasoned that when the board affirmed the superintendent's transfer of the teachers, it acted as a policymaker, thereby opening itself to liability for purposes of section 1983.[57]

In a second case from Texas, the Fifth Circuit believed that a district area superintendent who criticized an upcoming bond election, was subsequently demoted, and received his first negative evaluation in thirty-three years was entitled to a trial. In reinstating the complaint, the court judged that, as a matter of law, the administrator's speech was a matter of public concern. The court was of the view that whether the speech interfered with the board's efficiency in providing public education was a question of fact that could not be resolved in a motion for summary judgment.[58]

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[55] Rizzo v. Children's World Learning Ctrs., 173 F.3d 254 [134 Educ. L. Rep. 32] (5th Cir. 1999).

[56] Lovern v. Edwards, 190 F.3d 648 [138 Educ. L. Rep. 118] (4th Cir. 1999).

[57] Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216 [132 Educ. L. Rep. 662] (5th Cir. 1999).

A federal trial court in Tennessee decreed that a teacher who was dismissed after notifying the police that students were carrying knives to school was entitled to a new trial under section 1983 for alleged violation of her right to free speech. Even though the teacher prevailed in her first trial under both section 1983 and the state's Education Truth Reporting Act, the court added that since her reporting did not come within the language of the state law, she had to go to trial solely as to whether her reporting was on a matter of public concern.[59]

The federal district court in Puerto Rico held that a former executive director of the General Council on Education for Puerto Rico was entitled to a trial over whether his dismissal was in retaliation for claims he made pursuant to a whistleblowing statute. The court observed that insofar as allegations of fraudulent, illegal, and/or corrupt practices involved matters of public concern, to the extent that he could prove that his right to free speech was violated, the official who decided to terminate the director's contract was not entitled to qualified immunity since the right to be free from retaliation for exercising free speech is a clearly established constitutional right.[60]

According to the federal trial court in Maine, a former administrative assistant who resigned after being informed that he would be returned to teaching was entitled to a trial over whether the motivating factor behind his principal's action was his exercise of free speech. The court remarked that the assistant's reporting a teacher who was suspected of sexual misconduct to the police was a matter of public concern. The court wrote that whether the principal based the reassignment on the teacher's having exercised poor judgment in other matters was an issue for a jury.[61]

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[58] Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439 [137 Educ. L. Rep. 141] (5th Cir. 1999).

[59] Mosley v. Kelly, 65 F. Supp.2d 725 [139 Educ. L. Rep. 359] (E.D. Tenn. 1999).

[60] Pandolphi De Rinaldis v. Llavona, 62 F. Supp. 426 [138 Educ. L. Rep. 792] (D. Puerto Rico 1999).

[61] Dudley v. Augusta Sch. Dep't, 23 F. Supp.2d 85 [130 Educ. L. Rep. 1140] (D. Me. 1998).

In a second case from Maine, the federal trial court maintained that a teacher who was not recommended for a continuing contract advanced a prima facie case for retaliation based on statements she made about the building principal. The court agreed with the teacher that comments she made to school staff about the principal's behavior with students, staff, and parents implicated matters of public concern because she alleged her fears of abuse.[62]

A federal trial court in Florida, in a case involving a narrow interpretation of what constitutes public concern, dismissed a bus driver's claim that his remarks to a state investigator about a racially hostile work environment were protected speech. The court offered that the remarks did not constitute speech on a matter of public concern because they were made to the investigator and the driver "made no attempt to draw the public at large or its concerns into the picture."[63] In dismissing the free speech claim, the court reflected that the driver spoke in his role as a employee rather than as a private citizen.

In a second case where the speech at issue was not a matter of public concern, the Eighth Circuit overturned a jury verdict in favor of a former probationary teacher in Missouri who testified at his criminal trial for felony and misdemeanor sexual assault that he saw nothing wrong with consensual sex between a teacher and student. The court stated that the teacher did not have a free speech retaliation claim when his contract was nonrenewed because his remarks, even though compelled during cross examination, did not involve a matter of public concern about a legitimate disagreement with school board policies.[64]

Speech on a matter of public concern can be overcome if an employer produces evidence of preventing disruption and/or loss of confidence and trust. In upholding the dismissal of an assistant principal, the Supreme Court of Montana found that the balancing test in *Pickering v. Board of Education of Township High School District*,[65] was inapplicable since she was released because other administrators lost their confidence and trust in her.[66]

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[62] Green v. Maine Sch. Admin. Dist. # 77, 52 F. Supp.2d 98 [136 Educ. L. Rep. 823] (D. Me. 1999).

[63] Wallace v. School Bd. of Orange County, Fla., 41 F. Supp.2d 1321, 1326 [134 Educ. L. Rep. 879] (M.D. Fla. 1998).

[64] Padilla v. South Harrison R-II Sch. Dist., 181 F.3d 992 [136 Educ. L. Rep. 728] (8th Cir. 1999).

[65] 391 U.S. 563 (1968).

[66] Quick v. Bozeman Sch. Dist. # 7, 983 P.2d 402 [137 Educ. L. Rep. 819] (Mont. 1999).

In New York, a school board challenged the denial of its motion for summary judgment where a former assistant superintendent who was released for repeated comments at board meetings and on a radio talk show about the below average education afforded students and the lack of leadership by principals filed a section 1983 claim for free speech retaliation. Reversing in favor of the board, the Second Circuit was satisfied that the superintendent was objectively reasonable in terminating the administrator's contract and that no issue of material fact was raised since the dismissal was necessary to eliminate disruption.[67]

A federal trial court in Pennsylvania upheld the nonrenewal of a superintendent's contract over his objection that the board acted in retaliation for his criticism of its furloughing teachers and administrative staff. The court ruled that a superintendent, as a policymaker, has less free speech protection because the board "should have been able to expect cooperation in implementing their policies .... [The superintendent] was responsible for running the daily operation of the School District, subject to the oversight of the Board, and he had to carry out board policy."[68]

In Texas, a former special education teacher who was dismissed for hitting a student with a paddle in the course of disciplining him unsuccessfully filed a retaliation claim under free speech. Nine months prior to the hitting incident the teacher released videotapes about discipline problems in the school to the media but, during its discussion of his dismissal, the board discussed only the discipline incident. Despite the teacher's claim that the board's action was a pretext, the court held that "[a] plaintiff's subjective belief of retaliation, however, is insufficient to prove First Amendment retaliation."[69]

In Washington, a maintenance coordinator unsuccessfully claimed that he was dismissed for reporting the use of district employees to move a supervisor's furniture during work hours. An appellate court upheld the dismissal of the coordinator's free speech retaliation charge since he did not provide adequate notice of his claim. The court contended that the coordinator failed to allege that his speech interest was greater that the board's concern in promoting efficiency of its public services or that it would not have made the same personnel decision in the absence of protected speech.[70]

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[67] McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272 [137 Educ. L. Rep. 505] (2d Cir. 1999).

[68] Poteat v. Harrisburg Sch. Dist., 33 F. Supp.2d 384, 395 [132 Educ. L. Rep. 419] (M.D. Pa. 1999).

[69] Madison v. Houston Indep. Sch. Dist., 47 F. Supp.2d 825, 829 [135 Educ. L. Rep. 535] (S.D. Tex. 1999).

[70] Dewey v. Tacoma Sch. Dist. No. 10, 974 P.2d 847 [133 Educ. L. Rep. 1053] (Wash. Ct. App. 1999).

In a case of first impression, the Supreme Court of Colorado determined that free speech did not preclude an outgoing superintendent from enforcing the confidentiality provisions of a settlement agreement that he entered with his school district in connection with his resignation over unadjudicated allegations of sexual harassment. The court asserted that the confidentiality provision did not violate the state's Open Record's Act.[71]

Association

Both of this year's association claims were resolved in favor of school boards. The Supreme Court of New Hampshire upheld the dismissal of a teacher's complaint alleging that her contract was not renewed since she was not a member of a union. The court affirmed that the teacher failed to exhaust administrative remedies before pursuing contractual and constitutional claims.[72]

The Sixth Circuit affirmed that a teacher in Kentucky, the wife of a former superintendent, did not have a claim for retaliation when she reassigned to the classroom from her position as assessment coordinator. The court pointed out that the teacher failed to prove that her demotion due to lack of appropriate certification was a pretext for association with her husband who resigned when the State Board of Education filed charges to remove him as superintendent.[73]

Religion

The Second Circuit affirmed that a teacher in a special education services center in New York was not deprived of his First Amendment right as a result of a directive that prohibited him from speaking about his beliefs in the instructional process. In upholding a grant of summary judgment for the center, the court found that the teacher did not produce evidence that the directive was applied in an invalid manner.[74]

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[71] Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 981 P.2d 600 [136 Educ. L. Rep. 1055] (Colo. 1999).

[72] Konefal v. Hollis/Brookline Coop. Sch. Dist., 723 A.2d 30 [132 Educ. L. Rep. 151] (N.H. 1998).

[73] Whitaker v. Wallace, 170 F.3d 541 [133 Educ. L. Rep. 339] (6th Cir. 1999).

[74] Marchi v. Board of Coop. Educ. Servs. of Albany, 173 F.3d 469 [134 Educ. L. Rep. 92] (2d Cir. 1999).

An appellate court in Massachusetts affirmed that a public school teacher could not purchase additional credit for the time she spent teaching at religious nonpublic schools in a foreign country. The court rejected the teacher's free exercise claim that the denial of this benefit impinged on her right to practice her religion through teaching because the retirement board acted based on her having taught in a foreign country rather than her having taught in a religious school.[75]

Privacy

The Eleventh Circuit explained that the search of a school parking lot in Georgia with a drug-sniffing dog was not a search within the meaning of the Fourth Amendment. The court affirmed that when the dog alerted law enforcement officers about the presence of marijuana in a teacher's car, they had probable cause to search it without a warrant. The court also commented that the teacher's subsequent dismissal for refusing to take a drug test did not implicate her right against self-incrimination.[76]

The federal trial court in South Dakota ascertained that since the law prohibiting unreasonable searches was clearly established when a principal strip searched eighth grade students for stolen money, he was not entitled to qualified immunity. The court posited that it is "clearly established that strip searches, generally, are not reasonable."[77]

Substantive Due Process

Substantive due process addresses government action that is allegedly arbitrary or capricious. In a striking set of facts, the Second Circuit concluded that disciplining a teacher in New York for conduct that constituted a crime was not facially unconstitutional even though the statute applied to conduct that he engaged in twenty-four years earlier. In affirming a grant of summary judgment in favor of the school board, the court agreed that the three year statute of limitations did not apply to the state's tenure law. The court rejected the teacher's claim that his due process rights were violated when he was discharged twenty-four years after he had sexual contact with two former high school students since his conduct had clearly been a crime.[78]

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[75] Kennedy v. Contributory Retirement Appeal Bd., 713 N.E.2d 401 [136 Educ. L. Rep. 552] (Mass. Ct. App. 1999).

[76] Hearn v. Board of Pub. Educ., 191 F.3d 1329 [138 Educ. L. Rep. 662] (11th Cir. 1999).

[77] Konop v. Northwestern Sch. Dist., 26 F. Supp.2d 1189 [131 Educ. L. Rep. 201] (D.S.D. 1998).

[78] DeMichele v. Greenburgh Cent. Sch. Dist. No. 5, 167 F.3d 784 [132 Educ. L. Rep. 632] (2d Cir. 1999).

In a second case from New York, a federal trial court mandated that a school board's investigation of teacher who allegedly took photographs of young girls for a sexually gratifying purpose did not violate his substantive due process rights. The court agreed with the school board that since the young girls were the approximate age as the teacher's students, it would have been remiss in not investigating his conduct. The court permitted the teacher's removal from his classroom without pay and his subsequent reinstatement when officials found that he did not engage in conduct unbecoming a teacher.[79]

Where a superintendent failed to produce evidence that a school board acted arbitrarily in discharging in disregarding a hearing officer's recommendation that she should not be fired for cause, a federal trial court in Illinois granted its motion for summary judgment. The court noted that since the hearing officer served in an advisory capacity, nothing prevented the board from discharging her and subsequently suing her for fraudulently obtaining public funds.[80]

A federal trial court in Pennsylvania was of the opinion that a veteran did not have a protected property interest under the state's Veterans' Preference Act where he was not a qualified applicant for a teaching position. The court acknowledged that the Act provides a preference only when an applicant possesses the necessary qualifications for a position and that the plaintiff did not meet the standards established by the school board.[81]

Procedural Due Process

Procedural due process claims can arise in unusual sets of facts. In the absence of an allegation of a conspiracy, a federal trial court in Illinois judged that a superintendent who was dismissed by a majority vote of a school board could not maintain a due process claim against the two board members who voted to oppose the termination of her contract. The court rejected the former superintendent's allegation that the two board members' votes were cosmetic only and that they had been equal partners with a board member who voted for her dismissal.[82]

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[79] Montefusco v. Nassau County, 39 F. Supp.2d 231 [134 Educ. L. Rep. 127] (E.D.N.Y. 1999).

[80] Roberts v. Board of Educ., Hazel Crest Sch. Dist. No. 152 ½, 48 F. Supp.2d 1098 [136 Educ. L. Rep. 284] (N.D. Ill. 1999).

[81] Basile v. Elizabethtown Area Sch. Dist., 61 F. Supp.2d 392 [138 Educ. L. Rep. 745] (E.D. Pa. 1999).

[82] Roberts v. Board of Educ., 25 F. Supp.2d 866 [131 Educ. L. Rep. 128] (N.D. Ill. 1998).

Liberty and Property Interests

Litigation involving property interests generally revolves around claims of entitlement arising from statutory or contractual language that may entitle a person to a due process hearing. Liberty interests involve statements about a person's reputation that may entitle an individual to a name-clearing hearing.

The Seventh Circuit decided that tenured teachers in Illinois who lost their jobs had a federal claim to evaluate whether their tenure rights under state law entitled them to due process. In remanding the dispute to trial, the court reasoned that the only federal question involved property rights. The court added that since all remaining questions involved state law, the case had to be litigated in state court.[83]

In Florida, an appellate court affirmed that a band director who was reassigned to a job as an assistant band director failed to establish the existence of either a property or liberty interest. The court indicated that since the director's annual supplemental contract did not rise to the level of an entitlement, the board did not made allegations that warranted a name-clearing hearing.[84]

A school board in Indiana challenged a grant of summary judgment in favor of an educator who claimed that his not being reappointed to a list of persons eligible to serve as special education hearing officers deprived him of due process. Reversing in favor of the board, an appellate court held that having one's name on the list did not arise to the level of a property right.[85] On the other hand, in upholding an employee's claim against her school district for changes in its sick leave policy, a federal trial court in South Carolina believed that she had a protectable property right under state law. The court maintained that the policy, which established the order in which employees could use accrued and accumulated sick leave, violated both due process and state law by depriving workers of vested benefits.[86]

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[83] Shegog v. Board of Educ. of the City of Chicago, 194 F.3d 836 [139 Educ. L. Rep. 140] (7th Cir. 1999).

[84] Sickon v. School Bd. of Alachua County, Fla., 719 So. 2d 360 [130 Educ. L. Rep. 944] (Fla. Dist. Ct. App. 1998).

[85] Reed v. Schultz, 715 N.E.2d 896 [137 Educ. L. Rep. 768] (Ind. Ct. App. 1999).

[86] Armstrong v. School Dist. Five of Lexington and Richland Counties, 26 F. Supp.2d 789 [131 Educ. L. Rep. 169] (D.S.C. 1998).

Aspects of Notice

Notice refers either to information regarding the substance of charges or sufficient time to prepare for a hearing. An appellate court in New York confirmed an administrative determination that the testimony of numerous students regarding a teacher aide's physical contact with them was sufficient to sustain his dismissal. The court discerned that the aide's claim, that he was not aware that physical interaction with students was inappropriate, was disproved by testimony that he received warnings from three different witnesses.[87]

An appellate court in Alabama observed that days of service accumulated by school board employees as substitute custodians and as a clerical aide did not apply toward the three year probationary period. Consequently, the court stated that the employees were not entitled to notice and a hearing as required by the Fair Dismissal Act before their jobs were terminated.[88] However, the Supreme Court of Idaho was of the view that eliminating teachers' extra day assignments without notice and a prior hearing violated their constitutional rights. In affirming a grant of summary judgment in favor of the teachers, the court decreed that they had a property interest in the number of teaching days identified in their contract.[89]

Aspects of Hearing

The Supreme Court of California found that a state statute imposing half of the expenses for an administrative law judge on teachers who unsuccessfully challenged their suspensions or dismissals violated due process. The court offered that imposing a cost or risk on exercising the right to a hearing is impermissible if it has no other purpose or effect than to chill the exercise a constitutional right by penalizing those who raise such a claim.[90]

Issues regarding a hearing concern whether a person is entitled to a hearing and whether it was conducted consistent with the requirements of due process. In granting a school board's motion for summary judgment in a free speech retaliation suit, a federal trial court in Texas wrote that a teacher waived her rights to a pretermination hearing where she resigned. The court reflected that a pretermination hearing was unnecessary because the board was unaware that the teacher claimed constructive discharge when she resigned.[91]

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[87] Burkes v. Enlarged City Sch. Dist. of Troy, 684 N.Y.S.2d 57 [132 Educ. L. Rep. 527] (N.Y. App. Div. 1999).

[88] Ray v. Decatur City Bd. of Educ., 723 So. 2d 680 [131 Educ. L. Rep. 1171] (Ala. Civ. App. 1998).

[89] Lowder v. Minidoka County Joint Sch. Dist. No. 331, 979 P.2d 1192 [135 Educ. L. Rep. 1091] (Idaho 1999).

[90] California Teachers Ass'n v. State of Cal., 975 P.2d 622 [138 Ed. L. Rep. 1147] (Cal. 1999).

In a case involving the right to a hearing and an administrative investigation, an appellate court in New Jersey affirmed that the state Department of Youth and Family Services (DYFS) had the authority to investigate charges of child abuse but could not force a school board to take corrective action. Where DYFS made "not substantiated" findings and transmitted them to a district along with a recommendation that it take corrective action, the court agreed that the nontenured teachers who were subject of the investigation did not have a due process rights to a separate hearing to contest the district's employment decisions. Further, the court maintained that the teachers could not prevent the board from calling the persons DYFS interviewed as witnesses at a board hearing.[92]

Disputes over hearing rights can include questions about the constituency of the panel. The Supreme Court of Utah invalidated a school board's interpretation of its panel member selection policy that required an educator whose employment was being terminated to choose only school district employees as members of a hearing panel. Reversing a declaratory judgment that had been entered on behalf of the board, the court was convinced that the policy violated the terms of a provision in the operative collective bargaining agreement that allowed an employee who was dismissed to select two of the five members on a panel, with no limitation that those two individuals be district employees.[93]

A case from New York illustrated that hearing rights extend to issues involving attorneys. A trial court overturned a finding of teacher misconduct where the hearing officer did not permit the educator to confer with his attorney during breaks in the administrative proceeding. The court asserted that the hearing officer interfered with the teacher's statutory right to meaningful representation.[94]

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[91] Upshaw v. Alvin Indep. Sch. Dist., 31 F. Supp.2d 553 [132 Educ. L. Rep. 96] (S.D. Tex. 1999).

[92] In re L.R., 729 A.2d 463 [134 Educ. L. Rep. 966] (N.J. Super. Ct. App. Div. 1999).

[93] Board of Educ. of Alpine Sch. Dist., v. Ward, 974 P.2d 824 [133 Educ. L. Rep. 1049] (Utah 1999).

[94] Elmore v. Plainview-Old Bethpage Cent. Sch. Dist. Bd. of Educ., 690 N.Y.S.2d 842 [135 Educ. L. Rep. 1040] (N.Y. Sup. Ct. 1999).

In Pennsylvania, an appellate court upheld the nonrenewal of the contract of a teacher who was released as part of a reduction-in-force (RIF) despite his objection that the school board's solicitor and the hearing officer were employed by the same law firm. In defining the board solicitor's function as non-prosecutorial in the context of a RIF hearing, the court distinguished away other cases involving dismissal where prosecutorial and adjudicatory functions could not be commingled.[95]

Hearing officers must be non-biased. The Supreme Court of Idaho upheld the dismissal of two school board members from a principal's hearing due to basis charges. When the principal claimed, on appeal, that the other three members should also have been discharged, the court declared the issue moot because the discharge hearing had been completed.[96]

Generally, probationary or nontenured employees have no rights to a due process hearing. An appellate court in New York affirmed that a board of education has an unfettered right to terminate the employment of a probationary administrative assistant without a hearing. The court ruled that unless a probationary employee alleges that her dismissal was for a constitutionally impermissible reason, she is not entitled to a hearing under state law.[97]

In a second case from New York, a federal trial court pointed out that an administrator who voluntarily agreed to extend her three-year probationary period by one year was not entitled to a due process hearing when the school board voted to terminate her contract during its fourth year. According to the court, since a probationary employee has no entitlement to tenure, the administrator did not have a property right triggering a due process right to a hearing.[98]

An appellate court in North Carolina affirmed that a school board did not violate the due process rights of an at-will African-American bus driver when it reviewed evidence of earlier problems she had as a cafeteria worker. Although the board had not informed the driver that it intended to consider the earlier record, the court did not consider the omission to be fatal because the board had sufficient evidence to dismiss her based on a remark that she made to an African-American male student who misbehaved on her bus when she told him to "act your age and not your color."[99]

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[95] Callahan v. Mid Valley Sch. Dist., 720 A.2d 815 [130 Educ. L. Rep. 1279] (Pa. Commw. Ct. 1998).

[96] Miller v. Board of Trustees, 970 P.2d 512 [131 Educ. L. Rep. 1114] (Idaho 1998).

[97] Strax v. Rockland County Bd. of Coop. Educ. Servs., 683 N.Y.S.2d 588 [132 Educ. L. Rep. 522] (N.Y. App. Div. 1999).

[98] Emma v. Schenectady City Sch. Dist., 28 F. Supp.2d 711 [131 Educ. L. Rep. 698] (N.D.N.Y. 1998).

[99] Cooper v. Board of Educ. for Nash-Rocky Mount. Sch., 519 S.E.2d 536 [138 Educ. L. Rep. 562] (N.C. Ct. App. 1999).

Dismissal, Nonrenewal, Demotion, and Discipline

Employment decisions involving dismissal, nonrenewal, demotion, and discipline must be conducted in accord with statutory requirements. Where a school board's justification in not renewing the contract of a probationary teacher did not meet state statutory requirements, the Supreme Court of Ohio affirmed a ruling in favor of the teacher. The court interpreted the state's Teacher Tenure Act as requiring the board to provide the teacher with clear and substantive bases as to why it did not renew her contract. In agreeing that the teacher was entitled to back pay until she received an adequate statement with regard to the nonrenewal of her contract, the court explained that the board's statement referring to "deficiencies" in prior evaluations was unacceptable.[100]

In annulling a board's dismissal of a school bus driver, an appellate court in New York ascertained that the board could not rely on acts not alleged in the statement of charges. The court commented that it was insufficient that the evidence supported a charge that, in fact, was never made.[101]

Insubordination

In New York, an appellate court affirmed an administrative adjudication that a school board's dismissal of a teacher for refusing to answer questions in a prehearing investigation violated state statute. The court also upheld an administrative penalty of three years suspension since the teacher had become romantically involved with a student.[102]

An appellate court in New Jersey reversed a grant of summary judgment that had been entered on behalf of a school board and remanded a case for trial where a special education teacher alleged that officials retaliated against her after she testified on behalf of a special education student at a due process hearing. The court posited that a directive issued by school officials, prohibiting the teacher from contacting the student's mother unless another district employee was present, was sufficiently ambiguous to warrant a trial. The court was satisfied that the teacher raised a retaliation claim under the state's Conscientious Employee Protection Act when, at the hearing, she testified that school officials failed to comply with federal law by providing the child with an appropriate education.[103]

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[100] Geib v. Triway Local Bd. of Educ., 705 N.E.2d 326 [131 Educ. L. Rep. 1102] (Ohio 1999).

[101] Collins v. Parishville-Hopkinton Cent. Sch. Dist., 681 N.Y.S.2d 132 [131 Educ. L. Rep. 257] (N.Y. App. Div. 1998).

[102] Board of Educ. of City Sch. Dist. of City of N.Y. v. Mills, 680 N.Y.S.2d 683 [131 Educ. L. Rep. 248] (N.Y. App. Div. 1998).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

School districts prevailed in all five of the cases reported in this category. The first of two cases from the Supreme Court of Nebraska involved the thirty day suspension without pay of a teacher who tapped a student on the head. In reversing an earlier judgment in favor of the teacher, the court was of the opinion that the school board could reasonably conclude that tapping a student on the head violated its corporal punishment policy.[104]

The Supreme Court of Nebraska also overturned an earlier order reinstating a teacher who was dismissed after he wrapped one pupil with electrical cord and placed soap on the tongue of another student. In agreeing with the board that the teacher's actions constituted unprofessional conduct, the court contended that in order to be unprofessional, behavior does not specifically need to violate rules or the ethical code governing the profession.[105]

In reversing an administrative law judge's order over-turning a school board's dismissal of a teacher for sexually harassing a student, the Supreme Court of Appeals of West Virginia held that his behavior warranted dismissal. The court noted that the board had an explicit policy setting forth the kinds of behavior for which a teacher could be fired.[106]

An appellate court in New York upheld the dismissal of a custodian for misconduct where his failure to empty a waste paper container containing a burning cigarette led to a fire in a school.[107] The same court confirmed an administrative determination dismissing a second custodian whose smoking in a school building, in violation of the state's fire code, resulted in a fire that led to the evacuation of all students.[108]

In a third case from New York, an appellate court modified the sanction against a school bus mechanic who misrepresented his physical limitations on his ability to work. In imposing a two month suspension without pay and benefits, the court mandated that dismissal "[was] so disproportionate to the offense as to shock one's sense of fairness."[109]

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[103] Kolb v. Burns, 727 A.2d 525 [133 Educ. L. Rep. 981] (N.J. Super. Ct. App. Div. 1999).

[104] Daily v. Board of Educ. of Morrill County Sch. Dist. No. 62-0063, 588 N.W.2d 813 [132 Educ. L. Rep. 183] (Neb. 1999).

[105] Johanson v. Board of Educ. of Lincoln County Sch. Dist., 589 N.W.2d 815 [132 Educ. L. Rep. 916] (Neb. 1999).

[106] Harry v. Marion County Bd. of Educ., 506 S.E.2d 319 [130 Educ. L. Rep. 918] (W. Va. 1998).

[107] Russo v. Board of Educ. of Wantagh Union Free Sch. Dist., 686 N.Y.S.2d 836 [134 Educ. L. Rep. 260] (N.Y. App. Div. 1999).

[108] Smith v. Board of Educ. of Wantagh Union Free Sch. Dist., 686 N.Y.S.2d 835 [134 Educ. L. Rep. 262] (N.Y. App. Div. 1999).

Compliance with School Board Policies and State Statutes

This category presents a broad range of issues relating to state board policies and laws. An appellate court in Texas affirmed the reinstatement of a teacher after an independent hearing examiner failed to uncover evidence that she was unable to maintain effective working relationships with students, parents, and the community. The court reasoned that since the hearing examiner's findings were of fact, not conclusions of law, the school board erred in disregarding them in choosing not to renew the teacher's contract.[110]

State statutes create requirements that must be followed before employees can be disciplined. An appellate court in Oklahoma upheld the dismissal of a probationary teacher who did not receive an improvement plan under the state's Admonishment Statute. The court believed that since the charges against the teacher constituted misconduct, rather than inadequate teaching, the statute was inapplicable.[111]

The Supreme Court of North Dakota upheld the nonrenewal of a high school principal's contract after he alleged that the school board did not rely on formal reviews. The court observed that the board acted in light of the principal's past reviews even though his most recent evaluation was generally favorable.[112]

An appellate court in Louisiana overturned the dismissal of a janitor where a school board failed to follow statutory procedures. Even though the board had sufficient evidence to support dismissal, the court ordered the janitor's reinstatement due to procedural deficiencies.[113]

Meeting statutory probation requirements does not necessarily assure continued employment. The Supreme Court of Idaho upheld the dismissal of a teacher on probation and then satisfied the condition of her probation. The court decreed that the state law governing the nonrenewal of teachers' contacts required only that individuals whose work was unsatisfactory be placed on probation for a reasonable time. The court added that the statute did not require a board to renew the teacher's contract if the conditions were satisfied.[114]

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[109] Rice v. Hilton Cent, Sch. Dist. Bd. of Educ., 685 N.Y.S.2d 364, 365 [133 Educ. L. Rep. 230] (N.Y. App. Div. 1999).

[110] Montgomery Indep. Sch. Dist. v. Davis, 994 S.W.2d 435 [135 Educ. L. Rep. 1107] (Tex. App. 1999).

[111] Harjo v. Board of Educ. of Indep. Sch. Dist. No. 7 of Seminole County, 976 P.2d 1096 [134 Educ. L. Rep. 616] (Okla. Ct. Civ. App. 1999).

[112] Hoffner v. Bismarck Pub. Sch. Dist., 589 N.W.2d 195 [132 Educ. L. Rep. 531] (N.D. 1999).

[113] Thomas v. Evangeline Parish Sch. Bd., 733 So. 2d 102 [135 Educ. L. Rep. 866] (La. Ct. App. 1999).

The statutory remedies available to teachers against school boards may be limited. An appellate court in Missouri affirmed that a probationary teacher whose contract was not renewed following allegations of sexual molestation two years earlier lacked a remedy to compel the board to investigate the claims of molestation. The court judged that as long as the board's reasons for nonrenewal were truthful, it met its obligation under the state's Teacher Tenure Act. The court refused to impose a duty on boards to investigate the truth of allegations of sexual misconduct against probationary teachers.[115]

As reflected by a case from New York, state statutes may impose special compliance or reporting obligations. An appellate court upheld the dismissal of a superintendent for spending $100,000 of district funds without complying with statutory and administrative purchasing and bidding requirements. Despite the superintendent's claim that he was unaware of the relevant laws, the court indicated that superintendents are charged with the power and duty as chief executive officers to enforce all provisions of laws.[116]

In an interesting case with possible precedential value in other states, the Supreme Court of South Dakota reversed an earlier judgment upholding a school board's dismissal of a guidance counselor who failed to report possible sexual abuse of a student by her father. The court acknowledged that information available to the counselor did not rise to the level of reasonable cause to suspect abuse which would have triggered mandatory reporting pursuant to the board policy. The court wrote that the student's statements of improper touching by her father did not require reporting where the counselor had extensive contact with her in the past, knew her to be untruthful on many occasions, and, as a result, believed that the student fabricated stories of sexual abuse in order to gain attention.[117]

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[114] Kingsbury v. Genesee Sch. Dist. No. 282, 979 P.2d 1149 [135 Educ. L. Rep. 1080] (Idaho 1999).

[115] Smith v. King City Sch. Dist., 990 S.W.2d 643 [134 Educ. L. Rep. 1058] (Mo. Ct. App. 1998).

[116] Donlon v. Mills, 689 N.Y.S.2d 260 [135 Educ. L. Rep. 221] (N.Y. App. Div. 1999).

[117] Hughes v. Stanley County Sch. Bd., 594 N.W.2d 346 [134 Educ. L. Rep. 1024] (S.D. 1999).

Notice is a important statutory requirement when dealing with school employees. The Supreme Court of Nebraska reinstated a probationary teacher when her school board failed to follow statutory notice requirements. The court stated that the principal's evaluation of the teacher did not satisfy state's statutory notice provision when the board subsequently chose not to renew her contract.[118]

The Supreme Court of Arkansas affirmed that a school board's elimination of a coach's duties and reassigning him to a position as director/teacher of an alternative school amounted to nonrenewal of his contract. The court was of the opinion that since the board failed to meet the notice requirement in the state's Teacher Fair Dismissal Act when it eliminated his coaching duties, the educator was entitled to reinstatement.[119]

Three cases from Louisiana dealing with the employment of superintendents reflect that state law there does not accord them the statutory procedural rights of tenured teachers. An appellate court affirmed that a superintendent whose contract was not renewed when it expired after two years could not lay claim to the notice requirements available to tenured teachers. The court asserted that even though the superintendent was also a tenured teacher, specific statutes addressing the employment of superintendents could be enforced separately from the more general teacher tenure statute. The court concluded that reassigning the superintendent to another administrative position without following the notice requirements in the teacher tenure statute was permissible.[120] Another appellate court declared that an assistant principal was not entitled to 120 days notice where her initial two year contract was not renewed upon its expiration. The court offered that the 120 days notice requirement in the Teacher Tenure Law applies to subsequent contracts of employment, but not to initial contracts.[121] Subsequently, the same court rejected the assistant principal's request for a writ of mandamus to compel the board to issue her a new contract, reasoning that evaluation of employees is a discretionary, not ministerial, function.[122]

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[118] Bentley v. School Dist. No. 025 of Custer County, 586 N.W.2d 306 [130 Educ. L. Rep. 900] (Neb. 1998).

[119] Manila Sch. Dist. No. Fifteen v. White, 992 S.W.2d 125 [135 Educ. L. Rep. 847] (Ark. 1999).

[120] Milstead v. Jackson Parish Sch. Bd., 726 So. 2d 979 [133 Educ. L. Rep. 280] (La. Ct. App. 1998).

[121] Wright v. Caldwell Parish Sch. Bd., 733 So. 2d 1174 [135 Educ. L. Rep. 1124] (La. 1999).

[122] Wright v. Caldwell Parish Sch. Bd., 741 So. 2d 136 [138 Educ. L. Rep. 966] (La. Ct. App. 1999).

Reduction-in-force and Involuntary Leaves of Absence

Elimination of Position

The Supreme Court of Arkansas affirmed that a full-time, non-probationary cook whose position was eliminated was entitled to notice and a hearing under the state's Public School Employee Fair Hearing Act. The school board unsuccessfully argued that the Act did not apply to a RIF if positions are eliminated due to budget constraints.[123]

Realignment/Reassignment

An appellate court in New Jersey remarked that a social studies teacher who was transferred to a position for which he was certified was not entitled to reassignment back to his old position when it was open the following year. The court rebuffed teacher's argument under the state's tenure law that his transfer and the district's refusal to reassign him amounted to a dismissal. According to the court, the teacher did not have an argument because he was transferred to another full-time teaching position without any loss of salary or benefits.[124]

Call-back Rights

An appellate court in New Jersey affirmed that a teacher with seventeen years of experience who was reinstated seven years after being subjected to a RIF was not entitled to three special salary increases granted to faculty at the top of the pay scale. The court decided that even though the teacher would have been eligible for the raises had he not been RIFed, no contractual or statutory provision obligated the board to pay him increases.[125]

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[123] Gould Pub. Schs. v. Dobbs, 993 S.W.2d 500 [135 Educ. L. Rep. 857] (Ark. 1999).

[124] Carpentino v. Board of Educ. of Borough of Rumson, Monmouth County, 731 A.2d 538 [135 Educ. L. Rep. 567] (N.J. Super. Ct. App. Div.1999).

[125] Warren County Vocational-Technical Sch. Educ. Ass'n v. Warren County Vocational-Technical Sch. Bd. of Educ., 726 A.2d 939 [133 Educ. L. Rep. 541] (N.J. Super. Ct. App. Div. 1999).

Contract Disputes

Contractual benefits may depend on compliance with federal statutes, such as the Fair Labor Standards Act (FLSA). The Fifth Circuit ruled that whether staff working in a school district are subject to the FLSA depends on the degree of discretion that they exercise. As such, the court contended that since athletic trainers in a Texas school district were exempt from the FLSA, the were not entitled to overtime benefits.[126]

In a second case from Texas involving the same school district, an appellate court posited that a retaliatory discharge cause of action survived a claimant's death. The court rejected the board's position that a contract claim for personal services does not survive death because insofar as a common law a breach of contract action is assignable, it survives a party's death.[127]

As reflected by a case from Ohio, contractual questions can involve interpretations of union agreements. An appellate court confirmed an arbitration award granting part-time bus driving and bus garage worker's positions to an individual who worked as a school custodian. The court was satisfied that evidence of the employee's past drinking problem and his continuing to drink an occasional beer did not represent a safety problem under the union contract where the school board entrusted him with maintenance of boiler equipment and wiring.[128]

Board Policies and Contract Stipulations

A case from Texas reflects that the elements of a contract can be relevant in determining an employee's obligations. An appellate court, in affirming a grant of summary judgment in favor of a school board, agreed that a Director of Community Services was not entitled to have her job title retroactively reclassified with a corresponding increase in salary. The court commented that various letters and memoranda offered by the Director to sustain her claim were insufficient to create a protectable property interest under the state constitution.[129]

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[126] Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521 [137 Educ. L. Rep. 516] (5th Cir. 1999).

[127] Lindsay v. South San Antonio Indep. Sch. Dist., 983 S.W.2d 778 [132 Educ. L. Rep. 243] (Tex. App. 1998).

[128] Barnesville Exempted Village Sch. Dist. Bd. of Educ. v. Barnesville Ass'n of Classified Employees, 704 N.E.2d 36 [131 Educ. L. Rep. 500] (Ohio Ct. App. 1997).

[129] Jackson v. Houston Indep. Sch. Dist., 994 S.W.2d 396 [135 Educ. L. Rep. 1099] (Tex. App. 1999).

In Louisiana, an appellate court affirmed that a teacher who gave up vacation time with his family in order to tutor a hearing impaired student was entitled to sixteen days pay as the standard rate even though the child only showed up for two days. The court was convinced that the teacher met the criteria for detrimental reliance by presenting evidence that he changed his position in terms of vacation plans in reliance on the board's assurance that he would have sixteen days of work.[130]

Rights under a contract can take precedence over those identified in extra-contractual sources such as statutes and handbooks. An appellate court in Oregon held that a Director of Fiscal Services was entitled to sue for breach of contract where a school board failed to provide her with good cause termination, written of notice of dismissal, and a due process hearing as specified in a supplemental employment agreement. In reinstating the Director's breach of contract claim, the court pointed out that she was not limited to a writ of review of the board's hearing regarding her termination.[131]

School boards often enter into special agreements with employees who resign. A federal trial court in New York was of the opinion that a former superintendent may have a contempt of settlement agreement action against his board. Where the board revealed information from a sealed settlement that could negatively affect the superintendent's retirement benefits, the court ascertained that it could be liable for civil contempt.[132]

Another appellate court in New York affirmed that a teacher who received a $400,000 lump sum at retirement was not entitled to have that amount used in calculating his five year average for his retirement allowance. The court concluded that the sum was given in exchange for the teacher's retirement, not as earned compensation.[133]

As reflected by a third case from New York, contract issues arise over the appropriateness of resignations. An appellate court upheld a school board's denial of a food service worker's request to withdraw her letter of resignation. The court noted that since delivery of the letter to the board clerk constituted delivery to the board, it could not be withdrawn without the board's consent.[134]

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[130] Loup v. Louisiana State Sch. for the Deaf, 729 So. 2d 689 [134 Educ. L. Rep. 405] (La. Ct. App. 1999).

[131] Cloyd v. Lebanon Sch. Dist. 16C, 985 P.2d 232 [138 Educ. L. Rep. 541] (Or. Ct. App. 1999).

[132] Church v. Steller, 35 F. Supp.2d 215 [133 Educ. L. Rep. 54] (N.D.N.Y. 1999).

[133] Hall v. New York State Teachers' Retirement Sys., 697 N.Y.S.2d 763 [139 Educ. L. Rep. 593] (N.Y. App. Div. 1999).

[134] Grogan v. Holland Patent Cent. Sch. Dist., 693 N.Y.S.2d 792 [137 Educ. Rep. 334] (N.Y. App. Ct. 1999)

In a case that further refines who can accept resignations, a trial court in New York upheld a teacher's claim that a school board vote accepting her letter of resignation had to be annulled since she withdrew it before the superintendent presented it to the board for action. The court reasoned that under state law, the superintendent's prior acceptance of the resignation did not constitute a final acceptance.[135]

A case from New Jersey illustrates that board contracts are subject to common law rules. An appellate court affirmed that a contract elevating an assistant superintendent to superintendent was void ab initio and that he was rightfully returned to his job as assistant superintendent. The court explained that, as a public body, a school board lacks the authority to enter into a contract that will not take effect until after the expiration of the term of the appointing body.[136]

Administrative Regulations and Statutory Provisions

The largest number of cases in this section, most of which came from New York, and were resolved against employees, concern staff members making applications for retroactive membership in state retirement systems. School boards that successfully denied retroactive memberships produced evidence that employees actually received information and chose not to participate[137] or, due to the number of intervening years, proved that there were procedures in effect at the time of the complaining employee's employment that required notification of all new staff members about their option to enroll in the state retirement system.[138] Employees were also denied retroactive membership on the basis of being an independent contractor[139] and where an individual failed to appeal an earlier determination.[140] In a case with a similar result but for a different reason, a school employee in New York failed to qualify for retroactive membership where he failed to engage in at least twenty days service for each of two years between earlier and current employment periods.[141]

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[135] Totevski v. Board of Educ. of Hempstead Pub. Sch. Dist., 680 N.Y.S.2d 824 [131 Educ. L. Rep. 253] (N.Y. Sup. Ct. 1998).

[136] Gonzalez v. Board of Educ. of Elizabeth Sch. Dist., 738 A.2d 974 [138 Educ. L. Rep. 1104] (N.J. Super. Ct. App. Div.1999).

[137] Storrar v. Board of Educ. of Mahopac Cent. Sch. Dist., 684 N.Y.S.2d 256 [132 Educ. L. Rep. 859] (N.Y. Ap. Div. 1999); Lawlor v. Board of Educ., S. Colonie Sch. Dist., 692 N.Y.S.2d 787 [136 Educ. L. Rep. 1021] (N.Y. App. Div. 1999); Regan v. Board of Educ. for Massena Cent. Sch. Dist., 688 N.Y.S.2d 736 [134 Educ. L. Rep. 1008] (N.Y. App. Div. 1999).

[138] Chandler v. Board of Educ. for Chittenango Sch. Dist., 686 N.Y.S.2d 904 [134 Educ. L. Rep. 267] (N.Y. App. Div. 1999); Mendini v. Board of Educ., S. Colonie Cent. Sch. Dist., 693 N.Y.S.2d 278 [137 Educ. L. Rep. 325] (N.Y. App. Div. 1999); Price v. Board of Educ., Dunkirk City Sch. Dist., 690 N.Y.S.2d 764 [135 Educ. L. Rep. 1035] (N.Y. App. Div. 1999); Lefebvre v. South Colonie Cent. Sch. Dist., 694 N.Y.S.2d 804 [137 Educ. L. Rep. 766] (N.Y. App. Div. 1999); Andrasik v. Board of Educ., Dunkirk City Sch. Dist., 679 N.Y.S.2d 743 [130 Educ. L. Rep. 858] (N.Y. App. Div. 1998).

[139] Roesch v. Board of Educ. for Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 687 N.Y.S.2d 448 [134 Educ. L. Rep. 542] (N.Y. App. Div. 1999).

[140] Maxwell v. Board of Coop. Educ. Servs. of Nassau County, 681 N.Y.S.2d 335 [131 Educ. L. Rep. 470] (N.Y. App. Div. 1998).

Some employees were successful in securing retroactive membership. In upholding a teacher's petition for retroactive membership, an appellate panel in New York reversed an earlier judgment against her on the basis that the trial court improperly considered evidence. The panel added that the trial court could not consider documentation and affidavits that had not been before the hearing officer at the administrative hearing.[142]

An appellate court in Pennsylvania believed that a school board did not meet its statutory duty to provide notice of an employee's right to elect multiple service membership in the state's Public School Employees' Retirement System by sending a letter as part of a bulk mailing. The court observed that when a government entity neglects to carry out its mandatory statutory duties, its failure should not be laid at the feet of the person who is entitled to be the recipient of that duty.[143] Similarly, an appellate court in New York decreed that a teacher was eligible for retroactive membership where the school board failed to establish that she was informed of her right to join when she was first hired.[144]

In New York, an appellate court asserted that even though other teachers joined the state Teachers' Retirement System during the same period for which he was retroactively seeking membership did not establish that he had an opportunity to become a member. The court judged that the board failed to produce evidence of the similarity between the opportunity to join for the teachers and his colleagues.[145]

Where a school board in New York refused to process a teacher's retroactive application in the state retirement system, an appellate court directed it to do so. The court acknowledged that once an applicant meets the requirements of state law, retroactivity was up to the state retirement system, not a local district.[146]

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[141] Mars v. McCall, 685 N.Y.S.2d 851 [133 Educ. L. Rep. 557] (N.Y. App. Div. 1999).

[142] Moen v. Lansing Cent. Sch. Dist., 685 N.Y.S.2d 309 [133 Educ. L. Rep. 226] (N.Y. App. Div. 1999).

[143] Higgins v. Public Sch. Employees' Retirement Sys., 736 A.2d 745 [137 Educ. L. Rep. 1041] (Pa. Commw. Ct. 1999).

[144] White v. Freyman, 697 N.Y.S.2d 143 [138 Educ. L. Rep. 1136] (N.Y. App. Div. 1999).

[145] Mahoney v. Board of Educ. for Greater Amsterdam Sch. Dist., 681 N.Y.S.2d 385 [131 Educ. L. Rep. 476] (N.Y. App. Div. 1998).

[146] Jacobs v. Wappingers Cent. Sch. Dist., 697 N.Y.S.2d 350 [139 Educ. L. Rep. 572] (N.Y. App. Div. 1999).

In the first of four cases involving unemployment compensation, an appellate court in New York confirmed the Unemployment Insurance Appeal Board's denial of benefits to a former tenured teacher who resigned. The court indicated that the teacher's having resigned before receiving a poor performance evaluation did not constitute good cause for leaving his job.[147] Similarly, a nursery school teacher in New York who resigned to visit her son who lived in a mental institution did not qualify for unemployment compensation benefits. In upholding the Unemployment Compensation Appeal Board' denial of benefits, an appellate court agreed that the teacher left her job for personal and noncompelling reasons.[148] Likewise, an appellate court in New York affirmed that since a school bus driver was discharged for fighting with a coworker, he was ineligible for unemployment compensation insofar as he was released for misconduct and was.[149] Conversely, an appellate court in Florida discerned that the nonrenewal of a temporary teacher's contract based on her failure to pass the a state certification examination was not misconduct that made her ineligible for unemployment compensation. In reversing a judgment of the Florida Unemployment Appeals Commission, the court found that even though the teacher showed poor judgment in waiting until the last moment to take the examination, since her delay was not a refusal to take the necessary steps for certification, it did not constitute misconduct.[150]

A number of cases related to specific state laws. In New York, an appellate court affirmed that a school board violated the state's Civil Service Law when it sought to discipline teachers for peaceably assembling in front of the superintendent's office to protest potential disciplinary charges against a teacher who violated the same statute.[151]

Two coaches who were reassigned to other duties unsuccessfully claimed that their school board violated state's Teacher Fair Dismissal Act. An appellate court in Arkansas affirmed that the coaches forfeited their claims when they signed their new contracts since doing so rendered the Act inapplicable.[152]

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[147] In re Soto, 684 N.Y.S.2d 655 [132 Educ. L. Rep. 881] (N.Y. App. Div. 1999).

[148] Claim of Guevara, 680 N.Y.S.2d 757 [131 Educ. L. Rep. 252] (N.Y. App. Div. 1998).

[149] In re Williams, 685 N.Y.S.2d 812 [133 Educ. L. Rep. 553] (N.Y. App. Div. 1999).

[150] Caro v. Florida Unemployment Appeals Comm'n, 734 So. 2d 1077 [135 Educ. L. Rep. 1145] (Fla. Dist. Ct. App. 1999).

[151] Greenburgh No. 11 Union Free Sch. Dist. v. Kinsella, 684 N.Y.S.2d 705 [132 Educ. L. Rep. 886] (N.Y. App. Div. 1999).

[152] Metcalf v. Texarkana Sch. Dist., 986 S.W.2d 893 [133 Educ. L. Rep. 620] (Ark. Ct. App. 1999).

An appellate court in California stated that a teacher whose contract was terminated was entitled to a trial on a possible claim under the state's False Claims Act. The court offered that the teacher's expression of concern about inadequate staffing fell within the Act's prohibition of retaliatory discharges.[153]

In the first of two cases on issues related to retirement benefits, the Supreme Court of Mississippi reversed an earlier judgment invalidating a state statute which restricted the amount of lump-sum payments of accrued leave that retiring teachers were entitled to receive. The court wrote that since the statute did not involved a particular class, the legislature had a rational basis in ensuring solvency of its school districts.[154]

An appellate court in Georgia affirmed that a retired school superintendent who was receiving retirement benefits was entitled to continue doing so despite the claim of the Teachers' Retirement System (TRS) that he returned to service. The court maintained that due to the nature of the retired superintendent's work as an independent contractor, he was not an employee of the board for which he performed the services.[155]

Several cases addressed compensation issues. The Supreme Court of Appeals of West Virginia held that in hiring a principal, a school board had to fill the position from the pool of qualified applicants who submitted their materials during the posting period. Consequently, the court ordered the board to reinstate the applicant who met the conditions for the principalship and compensate him with back pay.[156]

The Supreme Court of Appeals of West Virginia affirmed that an attendance director and his assistant employed were not entitled to retroactive annual supplement pay of $600 available to classroom teachers with at least twenty years of experience. The court commented that neither employee had sufficient direct contact with students to qualify as classroom teachers.[157]

According to the Supreme Court of Pennsylvania, teachers who were transferred from a service unit to one of the school districts which received their services were entitled to credit for all of their years of experience. The court ruled that a collective bargaining agreement provision referring to newly appointed teachers did not apply to transfers between entities.[158]

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[153] LeVine v. Weis, 80 Cal. Rptr.2d 439 [130 Educ. L. Rep. 1286] (Cal. Ct. App. 1998).

[154] State v. Jones, 726 So. 2d 572 [132 Educ. L. Rep. 1029] (Miss. 1998).

[155] Teachers' Retirement Sys. of State of Ga. v. Forehead, 506 S.E.2d 913 [130 Educ. L. Rep. 1347] (Ga. Ct. App. 1998).

[156] Mingo County Bd. of Educ. v. Jones, 512 S.E.2d 597 [133 Educ. L. Rep. 602] (W. Va. 1998).

[157] Harmon v. Fayette County Bd. of Educ., 516 S.E.2d 748 [136 Educ. L. Rep. 598] (W. Va. 1999).

In South Carolina, teachers unsuccessfully challenged an adverse ruling over a freeze in salary supplements. An appellate court affirmed that when a school board froze teachers' local salary supplements, it did not violate a state statute that only prohibited districts from decreasing the amount of the supplement.[159]

An appellate court was convinced that a former principal who was a certified staff member when his school earned a monetary reward under the Kentucky Instructional Results Information System was entitled to share in that reward. The court was satisfied that eligibility to participate in the reward was set at the time that it was made, not when the money was actually received.[160]

As reflected by a case from Louisiana, voluntary resignations by employees do not necessarily limit their rights to compensation for accrued, unused vacation time. An appellate court was of the view that teachers who voluntarily resigned had vested rights to accrued, unused vacation time for which they had an expectation of compensation, the same as wages.[161]

In the first of two cases dealing with worker's compensation, the Supreme Court of Michigan affirmed that a school board can coordinate worker's compensation benefits with a disability pension under the Public School Employees Retirement Act. The court decided that a state constitutional provision treating pension benefits as contractual obligations that could not be impaired by legislative enactment did not prevent the reduction of worker's compensation benefits.[162]

An appellate court in Oregon ruled that a teacher's stress-related disorder was compensable under worker's compensation. The court decided that the teacher's four to six hours per day of off-duty preparation due to a change in assignments could be considered in determining whether this amount of work was inherent in every situation.[163]

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[158] Corbett v. Scranton Sch. Dist., 731 A.2d 1287 [135 Educ. L. Rep. 1011] (Pa. 1999).

[159] Richland County Sch. Dist. Two v. South Carolina Dep't of Educ., 517 S.E.2d 444 [136 Educ. L. Rep. 1071] (S.C. Ct. App. 1999).

[160] Walker v. Kentucky Dep't of Educ., 981 S.W.2d 128 [131 Educ. L. Rep. 537] (Ky. Ct. App. 1998).

[161] Picard v. Vermilion Parish Sch. Bd., 742 So. 2d 589 [139 Educ. L. Rep. 744] (La. Ct. App. 1999).

[162] Tyler v. Livonia Pub. Sch., 590 N.W.2d 560 [133 Educ. L. Rep. 1016] (Mich. 1999).

[163] Whitlock v. Klamath County Sch. Dist., 974 P.2d 705 [133 Educ. L. Rep. 1040] (Or. Ct. App. 1999).

In New York, an appellate court affirmed that since school social workers and counselors are not teachers under state law, they were not entitled to transfer sick and service credit. The court agreed that when a local board used employees of a Board of Cooperative Educational Services to provide special education services, it was not required to follow the statutory requirement that permits teachers who change districts to carry over all service credit and unused sick days.[164]

Tenure

Tenure Status

The Supreme Court of Ohio affirmed that a continuing service contract is available to those performing administrative duties and does not depend on a written agreement. As such, an administrator who served the minimum number of years required for that status could not be denied tenure on the ground that his service was as an administrator rather than as a teacher or because he did not have a written contract.[165]

In Minnesota, an appellate court affirmed that a teacher who faced dismissal for insubordination and conduct unbecoming a teacher was not entitled to the protection of the state's tenure act. The court interpreted state law as requiring the teacher, who was tenured prior to his transfer to another district, to be offered a fourth year contract in the new district before he attained tenure. The court added that even if he had tenure in his old district, the transferring teacher was still required to serve a three year probationary period in the new district.[166]

A teacher in New York challenged the denial of her request for judicial review when she was denied tenure. An appellate court affirmed that the teacher was not entitled to judicial review absent evidence that the board's reasons was impermissible or that she acquired tenure by estoppel.[167]

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[164] Board of Educ. of North Tonawanda City Sch. Dist. v. Mills, 693 N.Y.S.2d 271 [137 Educ. L. Rep. 321] (N.Y. App. Div. 1999).

[165] East Canton Educ. Ass'n v. McIntosh, 709 N.E.2d 468 [134 Educ. L. Rep. 284] (Ohio 1999).

[166] Washington v. Independent Sch. Dist. No. 625, 590 N.W.2d 655 [133 Educ. L. Rep. 589] (Minn. Ct. App. 1999).

[167] Williams v. Franklin Square Union Free Sch. Dist., 690 N.Y.S.2d 682 [135 Educ. L. Rep. 1033] (N.Y. App. Div. 1999).

Tenure by Default or Acquiescence

A federal trial court in Virginia granted a school board's motion for summary judgment in a suit filed by a Family Training Specialist (FTS) it hired to assist parents in instructing their children. The court contended that since the FTS did not qualify as a teacher for continuing contract purposes, she had no right of appeal when her contract was not renewed for a fourth year.[168]

Certification

Certification Standards

The Ninth Circuit upheld the California Commission of Teacher Credentialing's (CTC) use of the California Basic Educational Skills Test (CBEST) for teacher certification. Minority educators unsuccessfully challenged the use of the CBEST under title VII and title VI. In affirming a grant of summary judgment in favor of the state, the court agreed that title VI was inapplicable to the CTC and that title VII was not violated because the CBEST was properly validated.[169]

The Court of Appeals on New York upheld a board of education's denial of a teaching certificate to an applicant who was convicted of selling cocaine. The court agreed with the board that such a conviction within an "unreasonable risk" exception to the general rule that a prior conviction should not place a person under disability.[170]

In a second case from New York, an appellate court upheld the termination of the teaching licenses of two individuals who had not achieved passing grades on the National Teacher's Examination within five years of the issuance of their licenses. The court agreed that the school board had not acted arbitrarily or capriciously since the teachers failed to meet this basic requirement.[171]

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[168] Thurston v. Roanoke City Sch. Bd., 26 F. Supp.2d 882 [131 Educ. L. Rep. 179] (W.D. Va. 1998).

[169] Association of Mexican-American Educ. v. State of Cal., 183 F.3d 1055 [137 Educ. L. Rep. 43] (9th Cir. 1999), aff'd on rehearing, 195 F.3d 465 [139 Educ. L. Rep. 195] (9th Cir. 1999).

[170] Arrocha v. Board of Educ. of City of N.Y., 690 N.Y.S.2d 503 [135 Educ. L. Rep. 1027] (N.Y. 1999).

[171] Feldman v. Board of Educ. of City Sch. Dist. of City of N.Y., 686 N.Y.S.2d 842 [134 Educ. L. Rep. 262] (N.Y. App. Div. 1999).

An appellate court in Louisiana declared that a certificated teacher who applied for an open position filled by an uncertificated person stated a cause of action for failure to hire. In reinstating the teacher's complaint, the court held that the law affords a remedy because "to do otherwise would be to make acquisition of a education degree and submitting oneself to testing for certification vain and useless acts."[172]

Decertification, Revocation, or Suspension

An appellate court in Florida reversed the state's Education Practices Commission (EPC) suspension of a teacher's certificate on the ground of gross immorality where he married a sixteen-year-old student. The court found that the EPC imposed its own judgment and that the teacher's conduct did not rise to the level of gross immorality.[173]

In the first of two cases from Pennsylvania, an appellate court ruled that the Teacher Certification Law, which authorizes suspension of a teacher's certificate for specified offenses, was unconstitutional since it did not provide minimal due process protection. The court observed that insofar as the law mandates the suspension of a certificate based on a criminal indictment, the teacher was denied a property right without a meaningful pre-deprivation hearing.[174] Similarly, another appellate court in Pennsylvania noted that a teacher whose license was suspended following his arrest on charges of simple assault and child endangerment was denied due process. The court pointed out that mandating such a course of action deprived the teacher of a property right without due process of law.[175]

Conclusion

Cases involving employees continue to represent a broad range of legal issues. Moreover, there is a fairly even distribution between state and federal cases and between constitutional and statutory provisions. Overall, employees and school districts appear to be evenly split on success in court. Even though a significant number of cases involve federal constitutional and statutory issues in federal courts, a growing number of cases are litigated under state statutory and administrative provisions.

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[172] Rogers v. Avoyelles Parish Sch. Bd., 736 So. 2d 303, 307 [136 Educ. L. Rep. 1106] (La. Ct. App. 1999).

[173] Bush v. Brogan, 725 So. 2d 1237 [132 Educ. L. Rep. 1025] (Fla. Dist. Ct. App. 1999).

[174] Slater v. Pennsylvania Dep't of Educ., 725 A.2d 1248 [133 Educ. L. Rep. 521] (Pa. Commw. Ct. 1999).

[175] Petron v. Department of Educ., 726 A.2d 1091 [133 Educ. L. Rep. 545] (Pa. Commw. Ct. 1999).

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SCHOOL GOVERNANCE

Julie E. Lewis

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Introduction

This chapter focuses on claims involving school boards and districts. During the past year, many interesting cases involved desegregation and race-based student assignment. In addition, public school students and taxpayers continued to challenge state systems of financing education. The majority of cases impacting school governance involved employment affairs and student claims. The Supreme Court issued a landmark decision in a case addressing whether a private title IX damages action may lie against a school board in a case of student-on-student sexual harassment. Claims against school districts alleging violations of the Establishment Clause were frequent. Finally, cases involving school safety proliferated and are expected to increase as the nation grapples with incidents of violence on school campuses.

Desegregation

A variety of cases during the past year involved desegregation. Some of the litigation dealt with districts under desegregation orders and their commitments to previous court orders. Other disputes involved race-based admissions and transfer policies. The trend suggests that the pendulum may be swinging to the right as the judiciary has denied districts the opportunity to use race as a factor when trying to maintain diversity. However, there is no clear guidance in this area, particularly if one considers school districts that are not considered unitary.

As this book went to press, the Montgomery County Public School District in Maryland was in the process of filing a petition for a writ of *certiorari* asking the Supreme Court to review the Fourth Circuit's action. At issue was whether considering race in the assignment of students to public schools violates their right to equal protection even if it is necessary to do so to avoid creating racially isolated schools. The parents of an elementary-school student sued their district seeking declaratory and injunctive relief, as well as monetary damages, for claimed violations of section 1983 and title VI arising out of its policy of considering race as a factor in addressing requests for voluntary transfers between elementary schools. The district denied the student's request to transfer to a mathematics and science magnet school because doing so would have contributed to racial isolation at the school he attended. The federal trial court determined that the district's policy of considering race in evaluating whether to approve voluntary transfers was narrowly tailored to achieve its compelling governmental interests of fostering diversity and avoiding segregative enrollment patterns since it did not single out any race for automatic approval or denial of transfers and did not impose quotas.[1] The Fourth Circuit reversed the decision and ordered the district to admit the student to the magnet school, because its use of racial classifications in its transfer policy is insufficiently narrowly tailored to the interest of achieving diversity.[2]

In another case involving admissions policies, an applicant who wished to attend a public examination school in Boston challenged the constitutionality of a racially and ethnically conscious admission policy. The First Circuit held that the policy violated equal protection because it was neither justified on the basis of an asserted governmental interest in diversity nor as a means of redressing vestiges of past discrimination.[3] The court decided that once there is a finding of unitariness and the affirmative duty to desegregate is accomplished, educators are not expected to make year-by-year adjustments of the racial composition of student bodies absent a showing that either they or another state agency has deliberately attempted to fix or alter demographic patterns to affect the racial composition of schools.

Similarly, parents of a white student in New York who sought to transfer her from a city school to a suburban elementary school claimed that she was denied admission solely on the basis of race. The parents sued the board and school officials who implemented the urban-suburban interdistrict transfer program, alleging that they violated their daughter's constitutional rights. At issue was whether a district can deny a child the opportunity to participate in a school-sponsored program based on race. A federal trial court ruled that the answer had to be "no" because the program could not survive equal protection analysis[4]. The court thus granted the parents' motion for a preliminary injunction and directed district officials to allow the student to transfer to the suburban school pending final resolution of the dispute.

Other cases involved districts that were under long-standing desegregation orders. In one such action, a group of black children who attended public schools in Florida, along with the their parents and guardians, sued the county board alleging that it operated on a racially segregated basis under the color of state law. In 1962, the court entered an order finding that the board maintained an unlawfully segregated school system because it failed to evidence a good faith commitment to its desegregation orders[5]. The court retained jurisdiction because the board failed to fulfill its affirmative duty and continued to violate the Fourteenth Amendment. The court further ascertained that the district remains subject to the desegregation order until such time as it vacated by a declaration that it achieved unitary status. The court also ordered the board to provide the plaintiffs with the necessary documentation so that they could conduct an independent analysis and provide input with regard to desegregating the district.

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[1] Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp.2d 449 [130 Educ. L. Rep. 572] (D. Md. 1998).

[2] Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 [140 Educ. L. Rep. 88] (4th Cir. 1999).

[3] Wessman v. Gittens, 160 F.3d 790 [130 Educ. L. Rep. 1009] (1st Cir. 1998).

[4] Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp.2d 619 [132 Educ. L. Rep. 304] (W.D.N.Y. 1999).

A school district in Michigan fared better when a federal trial court considered its progress. The parties in a thirty-one-year-old desegregation class action that began when parents of African-American children sued the district for acts they deemed to be discriminatory or segregative, moved for approval of a proposed settlement agreement. The court approved the settlement on the basis that it was fair, reasonable, and adequate[6].

The United States and intervenors challenged a school board in Georgia's abandonment of a high school consolidation plan, alleging it violated a desegregation order. The Eleventh Circuit was presented with the question of whether a facilities plan that abandoned a high school consolidation plan rejected by voters who approved construction of a two-high school model, violated the district's desegregation obligations. The court affirmed that the two-high school facilities plan did not violate the order where the board was not racially motivated and acted in good faith, enrollment percentages deviated by no more than twenty percent from the district-wide average, and construction priorities were based on need[7]. In a separate opinion involving the same parties, the Eleventh Circuit addressed whether a 1973 order constituted a finding of unitary status made it inappropriate for the trial court to have retained jurisdiction in the case. The court held that the order was not intended to be a statement that the district achieved unitary status[8]. The court based its conclusion on whether local authorities eliminated the vestiges of past discrimination to the extent practicable and whether they had, in good faith fully and satisfactorily, complied with and showed commitment to, the desegregation plan.

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[5] Manning v. School Bd. of Hillsborough County, 24 F. Supp.2d 1277 [131 Educ. L. Rep. 54] (M.D. Fla. 1998).

[6] Berry v. School Dist. of Benton Harbor, 184 F.R.D. 93 [132 Educ. L. Rep. 817] (W.D. Mich. 1998).

[7] United States v. Georgia, Meriwether County, 171 F.3d 1333 [133 Educ. L. Rep. 719] (11th Cir. 1999).

[8] United States v. Georgia, Meriwether County, 171 F.3d 1344 [133 Educ. L. Rep. 730] (11th Cir. 1999).

Whether Cleveland should be declared unitary so that the federal courts no longer control student assignments and/ or require zoning and busing of students to achieve racial balance was before the Sixth Circuit. A certified class of African-American students and their parents filed suit alleging that the district adopted policies, customs, and practices in operating the school system in a manner that had the purpose and effect of perpetuating segregation. The Sixth Circuit affirmed that the irreconcilability of the consent decree's provision that student assignments in each school be within fifteen percent of the district racial ratio with its school choice provisions represented a material factual change and unforeseen circumstance which warranted modification of the decree such that the district was entitled to a declaration of unitary status[9].

Where a school district in Kansas sought a declaration of unitary status, the federal trial court precedent considered the following factors: whether there was full and satisfactory compliance with its decrees for a reasonable period of time; whether the vestiges of past discrimination were eliminated to the extent practicable; and whether the district demonstrated a good faith commitment to executing its orders, the law, and the Constitution. The court decreed that the district's good faith compliance warranted a declaration of unitary status[10].

In another case involving Charlotte-Mecklenburg, a federal trial court in North Carolina explained that since the district achieved unitary status in all respects, it would dissolve the thirty-year-old desegregation order[11]. At the same time, the court believed that the district's magnet school admissions policy went beyond constitutionally permissible bounds. The court rejected the district's argument that it had not complied with the Supreme Court's order from the original Swann v. Charlotte-Mecklenburg Board of Education[12]. Yet, the court noted that, to the extent reasonably practicable, the district complied with the desegregation order in good faith, that racial imbalances remaining in the schools were no longer vestiges of the dual system, and that it was unlikely that the board would return to an intentionally-segregative system.

In New York, whether vestiges of discrimination still existed was at issue. A city and the state contested a federal trial court's judgment that a school system still labored under two vestiges of de jure segregation insofar as there were low teacher expectations for minority students and an insufficient multi-cultural orientation of teaching techniques and curriculum. In opposition, the National Association for the Advancement of Colored People (NAACP), joined by the school board, which would have enjoyed a large infusion of state funding if the order were affirmed, argued that the evidence adequately supported the findings. The Second Circuit reasoned that the NAACP bore the burden of persuasion on whether vestiges of segregation remained in the schools and that the evidence that the district's curriculum and teaching techniques were insufficiently multicultural failed to constitute a vestige of segregation[13]. In addition, the court reversed in contending that there was insufficient evidence that low teacher expectations for minority students constituted a vestige of prior segregation.

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[9] Reed v. Rhodes, 179 F.3d 453 [135 Educ. L. Rep. 929] (6th Cir. 1999).

[10] Brown v. Unified Sch. Dist. No. 501, 56 F. Supp.2d 1212 [137 Educ. L. Rep. 931] (D. Kan. 1999).

[11] Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp.2d 228 [137 Educ. L. Rep. 934] (W.D.N.C. 1999).

[12] 402 U.S. 1 (1971).

State Funding

Most of the funding cases dealt with whether systems of public school finance were constitutional. Many of those who challenged the constitutionality of school funding systems did so under equal protection or the education clause of their state constitutions. Forty less wealthy school districts, their students, and taxpayers sued the state and various government officials claiming that the funding of public primary and secondary education violated the state constitution's education clause, state and federal equal protection clauses, and the Education Finance Act (EFA). The districts and other parties alleged that the system was underfunded to the extent that money was distributed without regard to district wealth, that it violated constitutional guarantees of equal protection, and that the funding resulted in inadequate educations. The Supreme Court of South Carolina indicated that while the districts, students, and taxpayers failed to present a cognizable equal protection claim, they presented one as to a violation of the constitution's education clause[14]. The court added that the EFA did not create a private cause of action for a violation of its provisions.

School districts and others filed a complaint seeking a declaration that the state's system of funding pubic education was unconstitutional. Previously, the Supreme Court of Ohio[15] posited that the system of financing elementary and secondary education violated the constitutional provision which requires the state to provide a thorough and efficient system of common schools. A trial court reviewed the new financing system, acknowledging that the state failed to comply with the order to create an entirely new public school financing system, thereby performing a complete systematic overhaul of funding primary and secondary education[16].

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[13] United States v. City of Yonkers, 181 F.3d 301 [136 Educ. L. Rep. 663] (2nd Cir. 1999).

[14] Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 [135 Educ. L. Rep. 833] (S.C. 1999).

[15] DeRolph v. State, 677 N.E.2d 733 [116 Educ. L. Rep. 1140] (Ohio 1997).

Students in Vermont sought declaratory and injunctive relief over the constitutionality of the statutory system of public school funding for amounts above the general state support grant. The students challenged the constitutionality of part of the Equal Education Opportunity Act, a primary objective of which is to make educational opportunities available to all children in each town on substantially equal terms. Insofar as the district that the plaintiffs attended is property-wealthy, some of the funds that it raised by property taxes to support spending above the basic grant were to be redistributed to property-poor districts. The state responded that the students' claim of inability to obtain equal educational opportunities was, at best, premature and speculative since they claimed that voters would not approve spending beyond the level of the state support grant because of the high tax rate it would have required the knowledge that part of the tax revenues would go to other districts. The court agreed with the state in maintaining that the students failed to present an actual or justiciable controversy.[17]

Property poor districts, students, and taxpayers petitioned for a declaratory judgment, alleging that New Hampshire's finance system violated the state constitution. Previously, in *Claremont II*,[18] the court commented that the school taxing system violated the state constitution as was disproportionate and unreasonable. The state argued that despite diligent efforts by the executive and legislative branches to comply with the tight time frame set in *Claremont II*, it has not yet been able to develop and implement a suitable system. The state sought a two-year period to create an education funding system to meet the mandates set forth in *Claremont II*. The court discerned that since an extension of the transition period was unwarranted, it would not create a contingent plan for temporary receivership to ensure state funding of public schools[19].

An association of superintendents, school districts, and students represented by their parents, claimed that Idaho's funding system failed to meet the requirement of the state constitution. The Supreme Court of Idaho had to evaluate what constituted a thorough system of public, free common schools within the meaning of the state constitution. The court observed that a thorough system of public, free common schools includes facilities that offer a safe environment conducive to learning, but did not require equalization of funding through a foundation formula for capital expenditure needs[20].

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[16] DeRolph v. State, 712 N.E.2d 125 [135 Educ. L. Rep. 637] (Ohio Com. Pl. 1999).

[17] Anderson v. State, 723 A.2d 1147 [132 Educ. L. Rep. 494] (Vt. 1998).

[18] Claremont Sch. Dist. v. Governor, 703 A.2d 1353 [123 Educ. L. Rep. 233] (N.H. 1997).

[19] Claremont Sch. Dist. v. Governor, 725 A.2d 648 [133 Educ. L. Rep. 161] (N.H. 1998).

Special Schools and School Districts

The lawfulness of the registration and funding of a private alternative educational programs for students with disciplinary problems was at issue in two consolidated cases. In the first, the plaintiffs claimed that the Oregon Department of Education failed to require either a statement of compliance with regulations prohibiting discrimination or proof of compliance with applicable fire, health, and safety regulations. In the second, the plaintiffs charged that a district and individual board members unlawfully funded a private school with public resources. An appellate court was of the view that the school's application for approval as a private alternative program satisfied the regulatory requirement of including a statement of compliance with the nondiscrimination rule but that the district failed to consider whether the program was necessary to meet the educational needs and interests of each student[21].

In the first of two other cases involving charter schools, districts in New Jersey challenged the State Board of Education's approval of three applications. One board adopted a resolution opposing the application on the grounds that the school would divert scarce funds from the existing district and that it did not meet the goals of the statute creating charter schools. Another board opposed an application claiming that the proposed school would have offered only programs currently present in the schools. The third board sent a letter to the Commissioner of Education raising twenty-five points of opposition. An appellate court affirmed that the applications met the informational requirements of state law and that the Commissioner of Education had the authority to grant them conditional approval.[22] In addition, the court offered that the law did not violate the constitutional right to a thorough and efficient education, did not unconstitutionally allow the use of public money for private purposes, and did not violate procedural due process or equal protection. The court pointed out that charter schools did not have to comply with traditional school laws.

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[20] ISEEO v. State, 976 P.2d 913 [134 Educ. L. Rep. 606] (Idaho 1999).

[21] Ellis v. Oregon Dep't of Educ., 967 P.2d 912 [130 Educ. L. Rep. 1334] (Or. Ct. App. 1998).

[22] In re Charter School Application, 727 A.2d 15 [133 Educ. L. Rep. 927] (N.J. Super. Ct. App. Div. 1999).

Charter schools in Michigan that attempted to open in a community subject to a desegregation decree sought state school aid funding. The parties to the original desegregation case objected to the petitions on the basis that funding any more charter schools would have prevented the district from meeting its obligations under the remedial order. A federal trial court remarked that the first school's funding would not be authorized without sufficient information regarding the racial composition of the student body to evaluate whether funding would impair the state's and district's ability to meet their obligations under the desegregation decree or result in resegregation.[23] However, the court permitted funding for the second school on the condition that its racial balance approximated that of the district as a whole, and that officials report the names of the students to the district.

School District Boundary Changes

A case from Texas considered the effect of boundary changes on a desegregation order where a subdivision of twenty-two students, twenty of whom were white, sought detachment from one school district and annexation to another. The move was only going to alter the racial composition of the district from which the subdivision was detached by approximately 2.7 percent. Residents of the subdivision challenged a declaratory judgment that the annexation violated the statewide federal school desegregation order. However, the Fifth Circuit wrote that the proposed boundary change violated neither the constitution nor the trial court's order.[24] According to the court, the evidence did not support the earlier judgment that the proposed detachment and annexation would have triggered further annexations and increased school segregation, or "tipping," in violation of the desegregation order.

In a case involving merger proposals considered by an area education agency, residents of of a school district sought judicial review of its dismissal of their petition to combine with another system into one newly organized district. During the pendency of that merger proposal, the first district filed a petition for a proposed merger with yet another system that the agency affirmed and voters approved. The district then argued that because its reorganization petition complied with state law, the agency was required to approve it and put it to a vote. The Supreme Court of Iowa affirmed that while the reorganization plan met statutory requirements, nothing compelled the agency's approval, and that its rejection of the proposed merger was supported by legally sufficient reasons.[25]

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[23] Berry v. School Dist. of Benton Harbor, 56 F. Supp.2d 866 [137 Educ. L. Rep. 693] (W.D. Mich. 1999).

[24] United States v. Texas, 158 F.3d 299 [130 Educ. L. Rep. 48] (5th Cir. 1998).

Where a school board denied a petition for a minor boundary change to place homes in a neighboring school district, the board challenged an order in favor of the property owners. The dispute arose when the families moved from one district to another, and their children attended schools in a third system under a tuition waiver program. When the families sought the boundary change, one hundred percent of the voters in their development signed, and the sending district approved, the petition. On considering the fixed rules, which the receiving board should have followed in order to avoid a finding of arbitrariness, the Supreme Court of South Dakota affirmed that the property owners were entitled to the boundary change.[26] The court reflected that while boards enjoy broad discretion in decision making, they must make sure that their actions are not arbitrary, capricious, or unreasonable. The court interpreted the board's action as arbitrary since the families had no alignment with the receiving district except as the county seat where they paid property taxes and obtained license plates.

Zoning

When a township zoning hearing board denied a district's application to expand a previously approved special exception to permit the use of an athletic field for non-school-related ball games, the district sought further review. An appellate court in Pennsylvania affirmed that the district had to abide by the zoning board's limiting the use of the field for school-related activities.[27] The court was of the opinion that statutory authority granted to districts under state law over the use of buildings for other purposes is not intended to preempt municipal zoning regulations.

Petitioners challenged a town's amendment of its zoning ordinance and its approval of a university's plan to implement a new cooling system while disputing a school district's conveyance of an easement to facilitate the project. An appellate court in New York affirmed the town did not exceed its statutory power or engage in illegal contract zoning, and that the district's conveyance of the easement was exempt from voter approval since it was an exchange.[28] The court was convinced that the connections between the four members of the town board and the university did not create conflicts of interest requiring invalidation of the zoning amendment.

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[25] Armstrong-Ringsted Community Sch. Dist. v. Lakeland Area Educ. Agency, 597 N.W.2d 776 [136 Educ. L. Rep. 1048] (Iowa 1999).

[26] Smith v. Canton Sch. Dist. No. 41-1, 599 N.W.2d 637 [137 Educ. L. Rep. 810] (S.D. 1999).

[27] Hazleton Area Sch. Dist. v. Zoning Hearing Bd. of Hazle Township, 720 A.2d 220 [130 Educ. L. Rep. 839] (Pa. Commw. Ct. 1998).

[28] De Paolo v. Town of Ithaca, 694 N.Y.S.2d 235 [137 Educ. L. Rep. 343] (N.Y. App. Div. 1999).

School District Board Members

At times, school board members are sued individually over their responsibilities. In Pennsylvania, a teachers' union sought a declaratory judgment against a board to prevent individual members from examining teacher evaluations. An appellate court affirmed that individual members lacked authority to act unilaterally in reviewing teacher personnel records under the guise of carrying out the responsibilities of the whole board.[29] The court asserted that neither state law nor board policy conferred such authority on individual board members, that the statute only authorized collective board action, and that the superintendent never implemented the policy purporting to grant individual authority to members. The court also thought that the examination of teacher personnel records by individual members was inconsistent with the board's duty to sit as an adjudicatory body in disputes over personnel.

Courts have addressed controversies over the ability of individuals to serve on school boards. Alabama filed a petition alleging that a teacher was ineligible to serve on a board of education while she was a classroom teacher in the district. The Supreme Court of Alabama held that since the statutory prohibition against permitting an individual who is subject to board authority from serving on one was valid, the teacher was ineligible to serve on the board.[30]

School board members instituted suits against fellow members over their ability to serve based upon where they live in the district. A school board representative sued members of a county board of education in their official capacities, requesting equitable relief in the form of reopening of the qualification period for the district into which he moved. The representative was the elected from District 5 but changed residences within the county. Prior to moving, the representative obtained confirmation from an agent of the board of registrations and elections that his new home was within District 5. Shortly after the qualifying period closed for the primary election to the regular term of the District 7 seat, officials discovered that the board district map, which had been used since 1991, contained a slight variance and that the representative's new home was actually located in District 7.

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[29] Bangor Area Educ. Ass'n v. Angle, 720 A.2d 198 [130 Educ. L. Rep. 830] (Pa. Commw. Ct. 1998).

[30] State ex rel. Pryor v. Martin, 735 So.2d 1156 [136 Educ. L. Rep. 1100] (Ala. 1999).

Thus, he declared his District 5 seat vacant and called for a special election for a replacement. The Supreme Court of Georgia ruled that a government employee's provision of erroneous information over the location of district boundary lines could not, as a matter of law, equitably stop the board from setting the correct boundary.[31]

Similarly, a school board sought a declaratory judgment that one of its members vacated his office by failing to keep his residence in the district that he represented, and that it had the authority to declare his seat vacant. An appellate court affirmed that the board had standing to challenge the member's qualifications to serve, that the Voting Rights Act did not require preclearance, and that since he testified that he lived outside of the district and had no present intention to return to live in it, he vacated his office.[32]

School District Board Meetings

In Texas, the former president of a school board challenged a guilty verdict in a dispute over whether he violated the Open Meetings Act by knowingly participating in a special closed meeting and by knowingly calling, aiding in calling, and organizing a special closed meeting of the board. An appellate court affirmed that a public official can be guilty of violating the Act even when he is unaware that a meeting is statutorily prohibited. That court further agreed that the Act can be violated even if an individual lacks a culpable mental state as to whether a closed meeting is permitted.[33]

A newspaper operator in Missouri sued a sheriff, school superintendent, and members of a county board of education, alleging that the board violated the Sunshine Law by voting on whether to rehire a controversial teacher in a closed session. The plaintiff alleged that the board purposefully violated the Sunshine Law by meeting in a closed session and by failing to provide full information on each individual board member's vote. An appellate court affirmed that the board did not violate the law by allowing the public to attend a closed meeting involving confidential information on rehiring of a controversial teacher, and that the statute did not require it to identify each member's vote.[34]

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[31] Ben Hill County Bd. of Educ. v. Davis, 510 S.E.2d 826 [132 Educ. L. Rep. 1017] (Ga. 1999).

[32] Tovar v. Board of Trustees, 994 S.W.2d 756 [136 Educ. L. Rep. 613] (Tex. App. 1999).

[33] Tovar v. State, 978 S.W.2d 584 [130 Educ. L. Rep. 929] (Tex. Crim. App. 1998).

[34] Smith v. Sheriff, 982 S.W.2d 775 [131 Educ. L. Rep. 1148] (Mo. Ct. App. 1998).

Four probationary teachers in California filed a petition for writ of mandate alleging that their board's failure to reelect them in a closed executive session violated the state's open meeting law, which requires certain employees to be given written notice of the right to have specific complaints or charges against them heard in an open session. An appellate court declared that since the reelection of probationary teachers was a personnel matter and did not involve a session in which the board would hear specific complaints or charges against the teachers, it was not required to give them twenty-four hour written notice of the right to have the complaints or charges heard in an open session.[35]

Whether a school board could open its meetings with a prayer was at issue in a case from Ohio. The Sixth Circuit affirmed that the prayers were unconstitutional because they were more like prohibited school prayers than permissible legislative prayers.[36]

Powers of School District Boards

Courts ordinarily examine board actions with great deference. A high school student sued her district over its policy of requiring pupils who transfer from non-accredited or home schools to pass proficiency exams at their own expense in order to receive credit toward graduation. The policy did not treat one group of individuals differently from another. A federal trial court in Texas noted that actions of local boards must be examined with great deference and care, because the judiciary lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy. The court ascertained that the policy was a valid, religion-neutral policy of general applicability that did not violate equal protection or the right to free exercise of religion.[37]

Where a school board dismissed a teacher for violating its sexual harassment policy, he filed a grievance. An administrative law judge concluded that while the board proved that the teacher engaged in the alleged acts of misconduct involving students by repeatedly making sexually oriented remarks to them, his dismissal was excessive. The Supreme Court of Appeals of West Virginia agreed that the board was authorized to dismiss the teacher for sexual harassment, and that it acted reasonably in doing so.[38] The court was convinced that the board had the duty to protect its students and to rectify conduct that clearly can constitute violation of federal law.

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[35] Fischer v. Los Angeles Unified Sch. Dist., 82 Cal.Rptr.2d 452 [132 Educ. L. Rep. 160] (Cal. Ct. App. 1999).

[36] Coles ex rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369 [133 Educ. L. Rep. 392] (6th Cir. 1999).

[37] Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp.2d 1012 [130 Educ. L. Rep. 647] (W.D. Tex. 1998).

[38] Harry v. Marion County Bd. of Educ., 506 S.E.2d 319 [130 Educ. L. Rep. 918] (W. Va. 1988).

A second case before the Supreme Court of Appeals of West Virginia involved a board's closing a small high school and requiring students to attend a new countywide consolidated high school. Students from the school that was to be closed, their parents, and an organization whose members wanted to preserve it claimed that the state's School Building Authority (SBA), which provides money for construction, usually awards aid only to fund construction at schools that meet minimum economies of scale size requirements: for high schools, 200 per grade level. The students argued that the SBA effectively forced county boards in sparsely populated rural areas to consolidate high schools. The students charged that the SBA's use of economies of scale was contrary to state law and unconstitutional since it impaired their state constitutional right to educational services and opportunities, without a rational basis and without being narrowly tailored in the least restrictive fashion to serve a compelling state interest. Reversing in favor of the SBA, the court decreed that the SBA was not statutorily prohibited from exercising discretion in weighing and applying statutory factors applicable to requests for state education funding, and that the lower court erred in believing that policies and actions favoring economies of scale could not survive strict scrutiny.[39]

The authority of a principal to enter into employment contracts on behalf of a school board was at issue where four teachers sought extra compensation. The principal designated the teachers as department chairpersons, a position that was not compensated beyond their regular salaries. The principal neither told the teachers that they would receive additional pay nor obtained board approval for their appointments as chairpersons. When the teachers discovered that the negotiated agreement between their bargaining representative and the board indicated that "Department Chairman" was an extra duty position with a corresponding raise, they unsuccessfully sought additional compensation. The Supreme Court of Idaho affirmed that since the agreement between the education association and board did not create a contract with any individual teacher, the chairs were not entitled to extra salary solely by reason of extra duty pay schedules in the agreement.[40] The court added that the principal lacked the authority to act for the board in hiring the teachers as chairpersons, and that they were not entitled to extra compensation based on the theory of board ratification.

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[39] Pendleton Citizens for Community Sch. v. Marockie, 507 S.E.2d 673 [131 Educ. L. Rep. 296] (W. Va. 1998).

[40] Gilmore v. Bonner County Sch. Dist., 971 P.2d 323 [132 Educ. L. Rep. 197] (Idaho 1999).

Whether to defer to a school board's interpretation of disputed language, which expresses official policy that is also the exact language of an earlier collective bargaining agreement, was before the Supreme Court of Utah when an educator on a continuing contract appealed her dismissal for cause. Pursuant to the bargaining agreement, which constituted her employment contract, the educator selected two persons to sit on the termination-hearing panel. The board rejected her choices, claiming that the two persons had to be current district employees. The court posited that since the board was bound by the prior bargaining contract that permitted an educator to choose anyone she wished to sit on the panel, it did not have discretion to interpret the termination selection panel process.[41]

Parents of public school children in Louisiana sued to keep their board from requiring a disclaimer to be read immediately before teaching evolution. After unsuccessfully attempting to introduce creation science into the district's curriculum as a legitimate scientific alternative to evolution, the board adopted a resolution disclaiming the endorsement of evolution. The Fifth Circuit affirmed that the disclaimer constituted an establishment of religion in violation of the First Amendment, because it did not further the articulated objective of encouraging informed freedom of belief or critical thinking by students.[42] In addition, the court determined that while the board had permissible secular objectives for purposes of the secular prong of the *Lemon*[43] test, the disclaimer violated this prong as well as the endorsement test. The court reasoned that the disclaimer violated *Lemon*'s second prong, whether a practice conveys a message of endorsement of disapproval, since its primary effect was to protect and maintain a particular religious view.

In a second case from Louisiana, a superintendent sued his school board under teacher tenure laws, seeking to require it to renew his employment contract. An appellate court affirmed that because there was conflict between the statutes dealing with superintendents and teacher tenure, the laws specifically directed at the former, which do not reflect the concept of tenure, must govern the board's right to reelect or dismiss a superintendent.[44]

The power of community boards of education was at issue in a class action suit challenging statutory amendments that reduced their powers. The boards alleged that the new method of selecting members of a city board of education, recent amendments to state law, and the Chancellor violated numerous statutes and constitutional provisions. The community boards claimed that the changes altered the relationship with the city board and Chancellor, for the most part enhancing his power at their expense. The boards also challenged the Chancellor's suspension or removal of community board members, who were primarily of racial or ethnic minorities. A federal trial court in New York City explained that members of the state legislature had absolute legislative immunity from suit.[45] Further, the court stated that the law governing the composition of the board did not violate constitutional restrictions on voting based on race and gender, and that the Chancellor did not violate the equal protection rights of the community board members he removed from office. Finally, the court held that community board members were not subject to disparate treatment in violation of their equal protection rights, and that the amendments did not violate due process or the First Amendment.

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[41] Board of Educ. v. Ward, 974 P.2d 824 [133 Educ. L. Rep. 1049] (Utah 1999).

[42] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 [137 Educ. L. Rep. 195] (5th Cir. 1999).

[43] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[44] Milstead v. Jackson Parish Sch. Bd., 726 So. 2d 979 [133 Educ. L. Rep. 280] (La. Ct. App. 1998).

In Texas, homeowners sued their school district to invalidate its attempted sale of eighteen acres of land adjacent to an elementary school. An appellate court affirmed that the district had the authority to sell the property under the general statute governing school boards' sales of property, and that the homeowners lacked standing to contest the transaction on grounds of defective notice.[46]

School District Financial Affairs

In Pennsylvania, a school district filed a certificate of liability against its former tax collector and surety, claiming it was owed the total amount of real estate tax revenues collected but not received. The collector misappropriated monies from 1960 to 1991, the time during which she served as the district's tax collector. At issue was the amount of the surety's liability and its ability to recoup monies collected during the tax collector's tenure but paid to the district after she resigned.[47] An appellate court affirmed that the proper measure of gross damages is calculated by the amount of the default admitted by the tax collector when she resigned. The court also offered that the surety might be entitled to recoupment for monies based on the equitable doctrine of recoupment.

A school district in New York sued a town to recover interest on tax revenues that were collected on its behalf but not disbursed. Previously the district recovered the principal sum of $48,029.16 from the town. Here the district proffered unrebutted evidence that it was also entitled to prejudgment interest in the sum of $30,404.63. An appellate court thus modified the earlier order, commenting that the district was prima facie entitled to judgment as a matter of law, and that unrebutted evidence warranted the award of prejudgment interest.[48]

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[45] Warden v. Pataki, 35 F .Supp.2d 354 [133 Educ. L. Rep. 76] (S.D.N.Y. 1999).

[46] Bell v. Katy Indep. Sch. Dist., 994 S.W.2d 862 [136 Educ. L. Rep. 621] (Tex. App. 1999).

[47] Central Bucks Sch. Dist. v. Cogan, 719 A.2d 7 [130 Educ. L. Rep. 220] (Pa. Commw. Ct. 1998).

School District Employment Affairs

Discrimination

A white clerical worker in Louisiana who was a school board employee for eighteen years sued under title VII and sections 1981 and 1983, alleging that she was a victim of reverse racial discrimination and gender discrimination. The employee claimed that she persistently complained to the head of her unit that she was subjected to unequal treatment, that she was not properly compensated, and that she was denied reclassification and an increase in salary based on race or gender. A jury awarded the woman compensation against the board and punitive damages against the superintendent. On appeal, the Fifth Circuit reversed in favor of the board and superintendent on the basis that the employee failed to establish the title VII claim, and that the record did not support a cognizable violation of sections 1981 and 1983.[49]

In an analogous case, a white female teacher in Illinois brought race discrimination and emotional distress claims against her board. The teacher claimed that she was subjected to a racially hostile atmosphere, and that the intimidation and racial harassment at her high school was unbearable. After a jury verdict in favor of the teacher, the Seventh Circuit reversed, acknowledging that since the district did not maintain an official discriminatory policy or custom, the teacher was not entitled to damages.[50]

A case from Mississippi presented a similar set of facts where a discharged business manager filed suit for racial discrimination under title VII and section 1983. The manager also charged that the board violated her due process rights because she was not given notice of the right to appeal her dismissal. The manager, a white female, claimed that she was fired as part of a scheme headed by the Lieutenant Governor to incur favor with black voters, and that a district official told her that she might have been able to get her job back, but the black community would have to be consulted. Thus, the woman never applied for the job. A federal trial court discerned that the manager failed to establish a prima facie case of racial discrimination on her not being rehired since she did not apply for the vacant position. The court further indicated that since the business manager did not have a claim to continued employment, the board's failure to notify of her right to appeal her dismissal did not give rise to a due process violation.[51]

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[48] Board of Educ. v. Town of Ossining, 694 N.Y.S.2d 110 [137 Educ. L. Rep. 338] (N.Y. App. Div. 1999).

[49] Baltazor v. Holmes, 162 F.3d 368 [131 Educ. L. Rep. 37] (5th Cir. 1998).

[50] Smith v. Chicago Sch. Reform Bd. of Trustees, 165 F.3d 1142 [132 Educ. L. Rep. 52] (7th Cir. 1999).

Sexual Harassment

In the first of two sexual harassment cases, an accountant in a finance department sued her school board under title VII and under state law for battery. After the accountant was transferred to the management information services department, she claimed that she was discriminatorily denied a promotion and reassigned to the finance department because she refused her supervisor's demands of sexual favors. The federal trial court in Maryland observed that the accountant's being reassigned to her original position was not an adverse employment action as a matter of law, that she failed to prove her reaction to her supervisor's alleged sexual advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment, and that she failed to show that her supervisor's alleged conduct interfered with her ability to perform her work or significantly affected her psychological well-being.[52]

A female teacher sued her school board alleging hostile work environment sexual harassment and failure to promote in violation of title VII. The teacher claimed that she was subjected to a hostile work environment based on the acts and explicit sexual remarks of her principal. A federal trial court in Florida maintained that the teacher established a prima facie case of hostile work environment sexual harassment but the board was not vicariously liable for the male principal's harassment.[53]

Due Process and Unfair Dismissal Claims

This section reviews employment claims including allegations that school boards violated the due process rights of employees. A teacher filed a petition in error against his district when he was dismissed for unprofessional conduct. The grounds for dismissal involved incidences of unprofessional conduct toward two students. In one incident, the teacher allowed his fifth grade class to hide from a student, tie him up with an extension cord, and refer to him as an "idiot." Another student claimed that the teacher physically and verbally abused him. The Supreme Court of Nebraska held that the board's failure to provide the teacher with a summary of the nature of the testimony against him in advance did not violate his right to due process, and that the evidence supported the finding of unprofessional conduct.[54]

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[51] Vance v. North Panola Sch. Dist., 31 F. Supp.2d 545 [132 Educ. L. Rep. 92] (N.D. Miss 1998).

[52] Francis v. Board of Sch. Comm'rs, 32 F. Supp.2d 316 [132 Educ. L. Rep. 131] (D. Md. 1999).

[53] Masson v. School Bd. of Dade County, 36 F. Supp.2d 1354 [133 Educ. L. Rep. 489] (S.D. Fla. 1999).

A former full-time, non-probationary cook alleged that her board's termination of her employment contract was invalid because it failed to comply with the notice and hearing requirements in state law. Although state law provides for notice of non-renewal of a full-time, non-probationary employee's contract no later than thirty days prior to the beginning of the individual's next contract, the board claimed that the law was inapplicable since the position was being eliminated due to budget constraints and a general reduction in the work force. Even so, the Supreme Court of Arkansas affirmed that the board was required to give the cook notice and an opportunity for a hearing before it could terminate her employment.[55]

In the first of four cases from New York, a former administrator sued his board and others, alleging that his dismissal violated the First Amendment and his due process rights. The administrator was an at-will employee hired for a three-year probationary term who regularly claimed that the district's lack of leadership caused students to receive below average educations. After two and one-half years, the board followed the superintendent's recommendation to terminate the administrator's contract. The Second Circuit was of the opinion that it was objectively reasonable for the superintendent to believe that he could recommend the administrator's dismissal without violating the First Amendment.[56] The court also wrote that the administrator's unsupported contention that he was dismissed in retaliation for speech did not give rise to a genuine issue of material fact as to the superintendent's subjective motivation, and that his unsupported speculations were insufficient to implicate his liberty interest in seeking future employment. In addition, the court reflected that the district's policy of providing limited information to prospective employers did not, on its face, give rise to stigma implicating a liberty interest, and that the administrator's dismissal did not violate due process.

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[54] Johanson v. Board of Educ., 589 N.W.2d 815 [132 Educ. L. Rep. 916] (Neb. 1999).

[55] Gould Pub. Sch. v. Dobbs, 993 S.W.2d 500 [135 Educ. L. Rep. 857] (Ark. 1999).

[56] McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272 [137 Educ. L. Rep. 505] (2nd Cir. 1999).

A former principal filed suit pursuant to sections 1983 and 1985 alleging that his school board and others violated his due process rights under the Fourteenth Amendment by denying him tenure. The principal claimed that the denial of tenure constituted the loss of a protected property and liberty interest, that he was entitled to tenure because of the defendants' failure to comply with provisions of his collective bargaining agreement, which require timely evaluations of administrators, and that he should have been awarded tenure by estoppel. A federal trial court in New York mandated that since the principal did not have a legal entitlement to tenure under state law, the board's failure to confer it on him did not give rise to a due process violation, and that he did not have a legally cognizable claim under section 1983.[57] Further, the court remarked that the principal failed to state a claim under the civil rights conspiracy statute, and that the extension of his probationary period foreclosed his claim of tenure by estoppel.

Where a probationary administrative assistant challenged the denial of her application for tenure and her accompanying dismissal, an appellate court affirmed in favor of the board. According to the court, the board had an unfettered right to terminate the administrator's job during her probationary period without a hearing where she did not allege that she was dismissed for any constitutionally impermissible purpose or in violation of a statutory proscription.[58]

A teacher who also coached a high school girl's softball team filed a section 1983 action against the board and others, alleging violations of his due process and free speech rights, intentional infliction of emotional distress, and prima facie tort claims over an investigation of charges that he surreptitiously photographed young girls and used them in a sexually gratifying manner. Following an investigation, the teacher was suspended with pay and removed from extracurricular activity assignments, including coaching, pending the outcome of a hearing that dismissed the charges against him and ordered his restoration. A federal trial court pointed out that the teacher's intentional infliction of emotional distress and prima facie tort claims were time-barred, that the board's actions were not sufficiently outrageous or atrocious to support a claim for intentional infliction of emotional distress, and that he was not deprived of any property interest as a result of the investigation or hearing.[59] The court further asserted that the board procedure did not deprive the teacher of his rights to procedural due process, substantive due process, or free expression.

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[57] Emma v. Schenectady City Sch. Dist., 28 F. Supp.2d 711 [131 Educ. L. Rep. 698] (N.D.N.Y. 1998).

[58] Strax v. Rockland Bd. of Coop. Educ. Servs., 683 N.Y.S.2d 588 [132 Educ. L. Rep. 522] (N.Y. App. Div. 1999).

[59] Montefusco v. Nassau County, 39 F. Supp.2d 231 [134 Educ. L. Rep. 129] (E.D.N.Y. 1999).

In Illinois, a former superintendent sued the board and individual members, alleging that her dismissal breached her contract, deprived her of a protected property interest in her employment under color of state law and without due process, and defamed her when board members maliciously and intentionally concocted unfounded charges against her. A federal trial court was convinced that the former superintendent could not pursue a breach of contract claim against members in their individual capacities because her contract was with the board, that she failed to raise a claim for deprivation of due process, that the board had statutory immunity from her defamation claim, and that board members were privileged from liability for defamation if their statements were made within the scope of their official duties.[60]

Employees in South Carolina challenged a school board's revised leave policy. Under the previous policy, the board did not compel the exhaustion of accumulated leave until all accrued or current leave was used. Under the disputed schedule, the board imposed an exhaustion requirement before employees could use accrued current sick leave. The employees charged that the board invaded benefits earned and vested by requiring exhaustion of accumulated leave without any evidence that they violated their contracts. The federal trial court agreed with the employees that the revised policy violated their contractual and statutory rights under state law, that it violated their due process rights by depriving them of vested benefits, that the revision breached the board's fiduciary duty, and that the board was estopped from depriving them of sick leave benefits accumulated in reliance upon prior promises or representations.[61]

Four employees in Alabama sued their board of education and others for wrongful dismissal, violation of the Fair Dismissal Act, and breach of contract. The employees, all of whom worked under a contract with a specified beginning and ending date, were substitutes before becoming regular staff members. The superintendent advised the board not to renew the contracts, but it did not vote on his recommendations. The workers unsuccessfully argued that if one added the time they had labored as substitutes to the years they were regular employees, they had worked for three years and were entitled to notice and a hearing before their contracts were terminated. An appellate court affirmed that the Fair Dismissal Act did not entitle the employees to notice and a hearing, that they were not entitled to fifteen days' notice of non-renewal, and that the board was not required to vote on the superintendent's recommendation.[62]

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[60] Roberts v. Board of Educ., 25 F. Supp.2d 866 [131 Educ. L. Rep. 128] (N.D. Ill. 1998).

[61] Armstrong v. School Dist. Five, 26 F. Supp.2d 789 [131 Educ. L. Rep. 169] (D.S.C. 1998).

A former superintendent sued his board and others, alleging due process violations and retaliation for exercising his right to free speech. When the superintendent and board disagreed over budget cuts, he expressed his views to it orally and in writing. There was also a grade-changing scandal that prompted an investigation by a board attorney. The board subsequently voted to dissolve the superintendent's contract without placing the matter on its agenda and without meeting to discuss it with him. A federal trial court in Pennsylvania ruled that the former superintendent did not have a property interest in his employment, that a publicly released report concerning his policies did not stigmatize him, that the speech against which the board allegedly retaliated was not protected under the First Amendment, and that individual board members had qualified immunity.[63]

In Louisiana, a janitor challenged his dismissal. The janitor alleged that the board failed to follow its procedures by not giving him a copy of the recommendation of his principal or department head, by not affording him the opportunity to resign or retire, and by not offering him a copy of the superintendent's recommendation. Even though the board proved that it had a rational basis for firing the janitor by producing evidence of his behavior, an appellate court believed that since it did not substantially comply with its own policy, he was entitled to reinstatement retroactive to date of dismissal.[64]

Other Employee Claims

Where an unsuccessful applicant for a position as high school principal filed a grievance, a state board ordered that the county board of education place him in the job. The plaintiff was the only person to submit an application during the specified posting period. The selection committee interviewed the applicant but requested that the job be re-posted even though he met the basic qualifications. The second posting resulted in the submission of one application and the interviewing of the candidate. The committee informed the superintendent that both candidates were qualified and that either would be a benefit to the school. Based on his knowledge of the applicants, the superintendent recommended that the second applicant fill the position. The Supreme Court of Appeals of West Virginia ordered the board to return the plaintiff to the job since he was the only person to apply within the deadline of the first posted notice of vacancy.[65]

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[62] Ray v. Decatur City Bd. of Educ., 723 So. 2d 680 [131 Educ. L. Rep. 1171] (Ala. Civ. App. 1998).

[63] Poteat v. Harrisburg Sch. Dist., 33 F. Supp.2d 384 [132 Educ. L. Rep. 419] (M.D. Pa. 1999).

[64] Thomas v. Evangeline Parish Sch. Bd., 733 So. 2d 102 [135 Educ. L. Rep. 866] (La. Ct. App. 1999).

A former superintendent sued his school board and individual members for breach of a settlement agreement, breach of a covenant of good faith and fair dealing, defamation, tortious interference with contract, and outrageous conduct where it initiated an investigation into complaints of sexual harassment that female employees made against him. When the investigator gave the board a detailed report indicating that there was a basis for the complaints, the superintendent agreed to resign pursuant to the terms of a written settlement agreement. The agreement included the condition that the board would not make any public statements that were inconsistent with the superintendent's announcement that he resigned for personal reasons. At issue on appeal was whether the board could escape the terms of a contract, based on its claim that it never should have entered the contract, because it was contrary to the First Amendment or public interest. The Supreme Court of Colorado held that neither the First Amendment nor public policy prevented the former superintendent from enforcing the confidentiality provisions regarding unadjudicated allegations of sexual harassment.[66]

After an assistant high school principal interviewed for a vacant principalship in her district, she published a letter to the editor of a local newspaper claiming that she was victimized by the superintendent and board. The letter described the selection process as a sham and urged the board to conduct an independent investigation. When the assistant principal was not hired for either job, she filed a grievance alleging that the board violated its hiring policies. Eventually, the board followed the superintendent's recommendation not to renew the assistant principal's contract at the end of the school year. The reasons for the recommendation generally cited the refusal of other administrators to work with the assistant principal her because of a lack of trust, loss of confidence, and their belief that her poor exercise of professional judgment disrupted the efficient administration of the district. When a trial court ordered the assistant principal's reinstatement, the board sought further review. The Supreme Court of Montana decided that the lower court erred in substituting its judgment for that of the superintendent.[67] The court added that the *Pickering*[68] balancing test was inapplicable, that good cause existed for the assistant principal's dismissal, and that her termination letter was sufficiently detailed to allow her to prepare a defense.

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[65] Mingo County Bd. of Educ. v. Jones, 512 S.E.2d 597 [133 Educ. L. Rep. 602] (W. Va. 1998).

[66] Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 981 P.2d 600 [136 Educ. L. Rep. 1055] (Colo. 1999).

Two teachers in Texas unsuccessfully sued their board and superintendent, alleging that they were transferred and reprimanded in violation of their First Amendment rights. The teachers, who were members of a site-based decision-making committee, spoke about an improvement plan at a meeting, reporting that many faculty members felt that the principal was not following the plan, and that the school needed a new principal to improve the situation. After the meeting, the superintendent reprimanded the teachers, transferring one to another school and the other to a guidance center. The Fifth Circuit reversed in favor of the teachers in determining that the superintendent's actions constituted an adverse employment action, that their speech was on a matter of public concern, and that their interest in free speech was not outweighed by the district's interest in promoting the efficiency of its services.[69] The court was satisfied that individual defendants were not entitled to qualified immunity, and that the board's action could fairly be said to represent the district's official policy because of its status as a policymaker.

A suspended director of a school board's audit department and a discharged auditor sued the board pursuant to the qui tam provision of the False Claims Act (FCA). The plaintiffs alleged that the board improperly charged two federal programs for more than their share of unemployment insurance and worker's compensation costs. A federal trial court in Louisiana denied the board's motions for summary judgment. The court ascertained that the information at issue was not a public disclosure, that the plaintiffs were the original sources of the information, and that a genuine issue of material fact existed as to whether the board had the appropriate level of scienter to support FCA liability.[70]

In a second case from Louisiana, a professional employee sued a school board and the superintendent, seeking a contempt citation because they hired a high school principal in violation of an injunction requiring the appointment to be made in accordance with specified procedures. The plaintiff argued that the order was binding on the board any time that it filled a principalship; the board countered that the order only applied when it promoted someone to fill a vacancy. A federal trial court noted that the board and superintendent were in civil contempt for not complying with the judicially ordered procedures for naming a principal, that they did not have absolute or qualified immunity over the appointment, and that the principal had to be replaced.[71]

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[67] Quick v. Bozeman Sch. Dist. No. 7, 983 P.2d 402 [137 Educ. L. Rep. 819] (Mont. 1999).

[68] Pickering v. Board of Educ. of Township High Sch., 391 U.S. 563 (1999).

[69] Harris v. Victoria Independent Sch. Dist., 168 F.3d 216 [132 Educ. L. Rep. 662] (5th Cir. 1999).

[70] United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 21 F. Supp.2d 607 [130 Educ. L. Rep. 701] (E.D. La. 1998).

The first of three cases from New York involved a teacher who sought to annul her school board's acceptance of her resignation. Although the teacher sent a letter to the personnel department expressing her intent to resign, she hand-delivered a copy to the superintendent while informing him that she was withdrawing it before the board had an opportunity to act. The board argued that since the superintendent was empowered to accept resignations, the teacher's action was final. A trial court posited that since it was undisputed that the teacher withdrew her resignation before the board accepted it, her resignation had to be annulled.[72]

A superintendent sued his board of education to recover damages for defamation, prima facie tort, and tortious interference with prospective business relations. An appellate court in New York affirmed that since board members made the contested statements in their official capacities when reviewing the superintendent's qualifications and job performance, their comments were absolutely privileged.[73]

In New York, a sixth grade teacher challenged her school board's denial of her request for reimbursement of the legal fees she incurred defending herself against a harassment charge arising out of disciplining a student. The board denied the teacher's request on the basis that since the use of corporal punishment was not in the scope of her employment, she violated its policy. A trial court was of the opinion that the teacher was statutorily entitled to reimbursement for the cost of her defense because she was discharging her duties as an instructor and acting within the scope of her employment.[74]

School District Contracts

Cases in this section involved disputes over the price of a contract, a board's ability to disavow a contract, impossibility of performance, and a board's authority to reject a bid. In a case from Minnesota over whether a price was agreed upon, a moving company sued a school board for breach of contract to recover the amount on an unpaid invoice. When a district employee contacted a company to discuss its bid, the individual affirmed that it was comfortable with the bid. An appellate court declared that federal law preempts the state's scheduled rate tariffs, and that the quote enumerated in the bill of lading reflected the final intent of the parties.[75]

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[71] Rambo v. Morehouse Parish Sch. Bd., 37 F. Supp.2d 482 [133 Educ. L. Rep. 496] (W.D. La. 1999).

[72] Totevski v. Board of Educ., 680 N.Y.S.2d 824 [131 Educ. L. Rep. 253] (N. Y. Sup. Ct. 1998).

[73] Jaeger v. Hyde Park Cent. Sch. Dist., 685 N.Y.S.2d 278 [133 Educ. L. Rep. 224] (N.Y. App. Div. 1999).

[74] Inglis v. Dundee Cent.Sch. Dist. Bd., 687 N.Y.S.2d 866 [134 Educ. L. Rep. 548] (N.Y. Sup. Ct. 1999).

A land developer unsuccessfully filed a breach action against a board where the parties entered into an agreement to develop land and construct a sewage treatment plant that the district would use once it erected a new elementary school. Under the contact, either party could terminate the agreement at any time prior to commencement of plant construction. When the successor board chose not to construct the new school, the developer sued. An appellate court in Pennsylvania affirmed that since the original board was performing a governmental function when it entered into the contract for the new school, its successor could disavow the agreement.[76]

In the first of three cases from New York, after terminating its contract with a district, a bus company brought a section 1983 action against a city school board, a competitor, and a school bus supplier. The company that was awarded the contract to transport students alleged that the board breached its contract by imposing conditions that rendered performance impossible, thereby violating its rights under the Contracts Clause and depriving it of its property interest without due process. A federal trial court concluded that the board was not entitled to Eleventh Amendment immunity from the section 1983 claim, that its actions relating to the contract were not legislative matters that interfered with the prevailing bidder's existing contract rights, and that the bus company's interests in the contract did not rise to the level of interests protected by substantive due process.[77]

A contractor challenged a grant of summary judgment in its breach of contract action after its claim was dismissed for failure to serve timely notice. An appellate court in New York affirmed that since the statutory period for service of notice of the claim began when the contractor submitted the invoice demanding payment of the full contract price, the case was properly dismissed.[78]

In New York, a company sought judicial review of the rejection of its bid on a contract to provide restroom partitions and accessories in public schools.

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[75] A.A. Metcalf Moving and Storage v. North St. Paul-Maplewood-Oakdale Sch., 587 N.W.2d 311 [131 Educ. L. Rep. 504] (Minn. Ct. App. 1998).

[76] Lobolito, Inc. v. North Pocono Sch. Dist., 722 A.2d 249 [131 Educ. L. Rep. 803] (Pa. Commw. Ct . 1998).

[77] Montauk Bus Co. v. Utica City Sch. Dist., 30 F. Supp.2d 313 [131 Educ. L. Rep. 974] (N.D.N.Y. 1998).

[78] Suburban Restoration Co. v. Wappingers Cent. Sch. Dist., 683 N.Y.S.2d 109 [131 Educ. L. Rep. 1099] (N.Y. App. Div. 1998).

An appellate court affirmed that the company's failure to comply with contract specifications based on fire safety considerations warranted rejection of its bid.[79]

An unsuccessful bidder on a school vending machine contract sued a board for allegedly violating state education code requirements for awarding contracts. An appellate tribunal in Texas maintained that insofar as the criteria listed in the education code governing purchasing contracts are the only ones that a board may consider in awarding a contract, the bidder was entitled to raise its complaint in court without first exhausting administrative remedies.[80]

School District Facilities

A religious organization sued a school board in New York pursuant to section 1983 seeking permanent injunctive relief requiring it to grant the group access to a high school auditorium. The religious group alleged that the denial of its request to use the auditorium was due to religious discrimination. A federal trial court agreed with the board that the denial of the use of the auditorium was lawful insofar as the religious organization could not demonstrate that the board's action was viewpoint-based or that it previously opened the facility to uses similar to the one that the organization proposed.[81] The court decreed that the policy, limiting access to the auditorium and not allowing outside groups to use it for lectures, speeches, rallies, debates, or similar activities, was reasonable and permissible.

On being denied use of a school cafeteria for meetings, the administrator and members of a nondenominational children's club brought a section 1983 action against the board, alleging that it violated their rights to free speech and equal protection. The club's stated purpose was to instruct children in family values and morals from a Christian perspective; a typical meeting includes an opening prayer, singing of Christian songs, and discussion of Biblical verses and scripture. The board feared that the club's activities constituted religious worship and instruction. A federal trial court in New York rejected the plaintiffs' claims in commenting that the board made a permissible distinction between clubs whose purposes and subject matter are substantially dissimilar in nature, and that the club at issue had a religious purpose.[82]

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[79] Santana Products v. Board of Educ. of New York, 690 N.Y.S.2d 672 [135 Educ. L. Rep. 1031] (N.Y. App. Div. 1999).

[80] R.G.V. Vending v. Weslaco Indep. Sch. Dist., 995 S.W.2d 897 [136 Educ. L. Rep. 1084] (Tex. App. 1999).

[81] Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp2d 178 [130 Educ. L. Rep. 128] (N.D.N.Y. 1998).

[82] The Good News Club v. Milford Cent. Sch., 21 F. Supp.2d 147 [130 Educ. L. Rep. 678] (N.D.N.Y. 1998).

Student Claims of Mistreatment

Once again, student claims against school officials and districts involved title IX of the Education Amendments of 1972. Under title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[83] In addition, many students claimed that their First, Fourth, or Fourteenth Amendment rights were violated. Negligent hiring and negligent supervision claims were also prevalent.

Claims Involving Title IX

The Supreme Court issued a landmark decision in *Davis v. Monroe County Board of Education*[84] when it allowed a private title IX action to proceed against a school board for student-on-student harassment. A mother in Georgia, on behalf of her fifth grade daughter, sued the board and various officials under title IX for failure to remedy a classmate's sexual harassment. Among other things, the mother alleged that officials' deliberate indifference to the classmate's persistent sexual advances toward her daughter violated title IX by creating an intimidating, hostile, offensive, and abusive environment. The Court explained that a private damages action may lie in a case of student-on-student harassment, but only where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars a victim's access to an educational opportunity or benefit. At the same time, the Court offered that damages are not available for simple acts of teasing and name-calling, even where the comments target differences in gender.

Shortly before *Davis* was handed down, a student sued a school board under title IX for allegedly having been sexually harassed by a male teacher. The student unsuccessfully claimed that the board should have been liable for negligently hiring the teacher, for failing to supervise him properly, and or for violating title IX. The board argued that, even assuming the teacher had sexually harassed the student, it was not liable under *Gebser v. Lago Vista Independent School District*[85] because no official with supervisory authority knew about the alleged harassment until the student reported it, and that administrators took prompt action to investigate the claim and initiate termination proceedings against him. The Supreme Court of Alabama affirmed that the board was not liable under title IX.[86]

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[83] 20 U.S.C. § 1681(a).

[84] 119 S. Ct. 1661 [134 Educ. L. Rep. 477] (1999).

[85] 118 S. Ct. 1989 [125 Educ. L. Rep. 1055] (1998).

In another case that was resolved prior to *Davis*, an elementary school student and her parents sued their board alleging that the child was subjected to repeated sexual harassment and sexual abuse at the hands of two classmates. The plaintiffs alleged that school officials knew of the ongoing harassment but failed to take prompt and appropriate remedial action. A federal trial court in Tennessee reasoned that the board was not an entity capable of being sued separately and distinctly from the metropolitan government under state law, that as a matter of first impression, title IX authorizes a cause of action based on the school's failure to respond appropriately to student-on-student sexual harassment, and that the child established a prima facie case of student-on-student hostile environment sexual harassment.[87] The court also acknowledged that the student's parents lacked standing to assert title IX claims in their individual capacities.

A former student in Nebraska brought a section 1983 action and title IX hostile environment sexual harassment claim against a school district, various officials, and a high school teacher with whom she had a homosexual relationship. While an appeal was pending, the Supreme Court ruled in *Gebser*. Following *Gebser*, the Eighth Circuit was of the view that the student failed to make the necessary showing that school officials acted with deliberate indifference after being placed on notice of the teacher's harassment.[88] Further, the court observed that the teacher could not be sued in her individual capacity under title IX but that the student could sue her individually under section 1983 for allegedly violating her Fourteenth Amendment rights.

In a case from Colorado, a mother, on her own behalf and as her daughter's guardian, sued a school board and others under title IX and section 1983 based on the board's failure to take appropriate actions after the young woman was sexually assaulted by a male student. The student was assaulted even though her mother informed the principal and her special education teacher that she had been sexually assaulted at her previous school and that she feared that her disabilities would place her at continued risk. In addition, school officials knew that the offending classmate had significant disciplinary and behavioral problems including engaging in sexually inappropriate conduct. Moreover, although teachers were aware of several incidents during which the female was sexually assaulted and battered, they did not inform her mother and told her not to do so either. The Tenth Circuit found that the mother presented a claim against the district under title IX for peer sexual harassment and against the principal and teachers under section 1983 for violating her daughter's right to equal protection by allegedly refusing to remedy the sexual harassment despite having actual knowledge of it.[89] However, the court wrote that the mother failed to allege a municipal policy or custom required to maintain an equal protection claim against the district, and that the principal and teachers were not entitled to qualified immunity from the section 1983 claim.

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[86] H.M. and M.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 [130 Educ. L. Rep. 952] (Ala. 1998).

[87] Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp.2d 991 [132 Educ. L. Rep. 357] (M.D. Tenn. 1998).

[88] Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607 [133 Educ. L. Rep. 418] (8th Cir. 1999).

In a dispute from Texas, submitted after *Davis,* a female student and her parents brought a section 1983 action against a school district, principal, and teacher where the board refused to allow the plaintiffs to address the board about the student's having been sexually harassed. An appellate court affirmed that the plaintiffs' allegations failed to show that the district, principal, or teacher, whether officially or in their individual capacities, were liable under section 1983. The court remarked that the plaintiffs failed to state a claim under title IX, because they did not make an allegation of harassment that was severe, pervasive, and objectively offensive enough to deprive her of access to educational opportunities or benefits. The court asserted that the parents and student could not recover from the district without showing that it had an official policy or custom, that the teacher and principal did not violate equal protection or due process, that the parent lacked a First Amendment right to address the board, and that the district did not violate title IX.[90]

In another post-*Davis* case, a student and her parents sued a district and administrators over claims arising from the physical and sexual assaults, including forcible sexual intercourse, that she suffered at the hands of a teacher while at school and elsewhere. School officials had actual knowledge of the teacher's improper actions toward the student and other female children but acted with deliberate indifference. The officials failed to institute corrective measures, such as reporting the conduct to the Department of Social Services or protecting the child and other students from the teacher even though they had actual knowledge of his prior sexual assault on another female student. Additionally, district officials failed to train administrators, teachers and staff to recognize, report, investigate or mitigate sexual harassment by teachers against students. The federal trial court in Massachusetts pointed out that remedies for sexual harassment under title IX did not foreclose a section 1983 claim, and that charges against the district and officials for breach of duty to prevent or mitigate the teacher's behavior by failing to investigate or report allegations that he had previously sexually assaulted other girls were barred by the state Torts Claims Act.[91] The court discerned that state law barred such claims since the teacher's tortious conduct was not originally caused by the district or its administrators, and his sexual misconduct was not within the scope of his employment.

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[89] Murrell v. School Dist. No. 1, 186 F.3d 1238 [137 Educ. L. Rep. 474] (10th Cir. 1999).

[90] Mosley v. Beaumont Indep. Sch. Dist., 997 S.W.2d 934 [137 Educ. L. Rep. 404] (Tex. App. 1999).

Constitutional Rights

Parents of a student in Maine who unsuccessfully attempted suicide sued their board of education, a gym teacher, and others under section 1983 and state law on behalf of themselves and their daughter. When the fourteen-year-old eighth grade student was reprimanded by her gym teacher for misconduct and sent to a locker room without supervision, she tried to hang herself. The student survived but spent several weeks in a coma and was left with permanent impairments. The student's complaint described two incidents as background. First, she claimed that school officials knew that the student had been raped when she was thirteen. Second, she charged that seven other schoolmates had attempted suicide in the previous three months. The complaint alleged that administrators failed to take measures to cope with the epidemic, such as offering counseling and monitoring programs. The First Circuit affirmed that a school's failure to protect a student generally is not a substantive due process violation, and that the failure of officials to prevent the attempted suicide, after attempts by seven other students, did not violate substantive due process.[92] Finally, the court was convinced that the gym teacher did not violate substantive due process when he reprimanded the student and sent her to the locker room.

In a case from Arkansas, a student and his parent sued their school board claiming that its policy of randomly testing pupils for drugs in grades seven through twelve violated his rights under the Fourth and Fourteenth Amendments. Under the policy, if a student or parent refuses to undergo testing, the child is precluded from participating in extracurricular activities. The Eighth Circuit affirmed that neither a warrant nor particularized suspicion of drug use was required before drug testing could be ordered, and that for purposes of the balancing test used to evaluate the constitutionality of the policy, student expectations of privacy are lower than those of the general population.[93] The court agreed that the intrusion on the student's privacy was minimal given the limited nature of testing, his having been afforded privacy while producing the sample, and the board's having set measures in place to safeguard the results. The court concluded that the board's concerns over drug use could be balanced against the student's privacy interest even though there was no current evidence of drug use in the schools, and that its desire to prevent drug and alcohol use outweighed the intrusion on privacy.

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[91] Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp.2d 114 [137 Educ. L. Rep. 611] (D. Mass. 1999).

[92] Hasenfus v. Lajeunesse, 175 F.3d 68 [134 Educ. L. Rep. 826] (1st Cir. 1999).

[93] Miller ex rel. Miller v. Wilkes, 172 F.3d 574 [133 Educ. L. Rep. 765] (8th Cir. 1999).

The constitutionality of strip searches was at issue in a case brought by two eighth grade students in South Dakota who were strip searched by a music teacher for allegedly stealing $200. The students sought a declaratory judgment that the strip searches, which they claimed were authorized by school board policy, were unconstitutional. School officials responded that they were entitled to qualified immunity, or alternatively, as a matter of law, that the searches were not unreasonable. The federal trial court noted only that declaratory relief was appropriate, but also that the search, as conducted, was not justified at its inception.[94]

In a third case involving the Fourth Amendment, the parents of a student who was allegedly subjected to an intrusive search, including testing of bodily fluids without reasonable suspicion, filed a section 1983 action against school officials. The parents also claimed that the educators disclosed the results of the search to other students in violation of their daughter's right to privacy under the Ninth and Fourteenth Amendments. According to the federal trial court in New Jersey, the teacher who reported the suspicion that the student was under the influence of drugs or alcohol was statutorily immune from liability and the school nurse and principal were immune for ordering her to be tested.[95] In addition, the court judged that the inadvertent disclosure of the student's negative test result did not violate a state or federal constitutional right to privacy, and that board members were statutorily immune from liability on the theory of failure to train and supervise.

A mother filed a section 1983 action on behalf of her son against their school board and assistant principals in Florida alleging that his suspension from school for displaying a Confederate flag violated his First Amendment rights. The student, who cultivated a keen interest in Civil War history, used his free time to participate in Civil War re-enactments and living histories. During an outdoor lunch break at school, the student was discussing his avocation of Civil War history and his hobby as a reenactor with a small group of friends. When the student displayed a Confederate battle flag to his friends, an assistant principal approached him, told the student to accompany him to an administrative office, and suspended him. The Eleventh Circuit indicated that the suspension supported a claim against the assistant principal for violating the student's clearly established First Amendment rights, that they did not have final policymaking authority, and that the board was not liable since it did not have a custom or practice of banning Confederate symbols.[96]

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[94] Konop v. Northwestern Sch. Dist., Genzler v. Northwestern Sch. Dist., 26 F. Supp.2d 1189 [131 Educ. L. Rep. 201] (D.S.D. 1998).

[95] Hedges v. Musco, 33 F. Supp.2d 369 [132 Educ. L. Rep. 404] (D.N.J. 1999).

Conversely, parents of a middle school student in Kansas sued their district for violating his First Amendment right when he received a three day suspension for drawing a picture of a Confederate flag on a piece of paper during class. The board suspended the student for violating its "Racial Harassment or Intimidation" policy, which forbids students in school from possessing "any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred," and which includes as examples of prohibited items, "any item that denotes . . . Confederate flags or articles."[97] The federal trial court in Kansas ascertained that the policy did not violate the First Amendment and was within the district's lawful authority to teach students to operate within the boundaries of socially appropriate behavior.

An African-American high school student sued her board of education and officials alleging that their refusal to permit her to wear a headwrap to class as a means of celebrating her cultural heritage violated her First Amendment right to free speech. The school rule prohibits students from wearing hats in class but makes exceptions for religious headgear such as yarmulkes and Muslim hijab, including headscarves. The federal trial court in Maryland ruled that the policy did not violate the student's free speech rights or her right to be secure in her person.[98]

The father of two Caucasian siblings filed a racial discrimination case against a school board and others, alleging that the district's admissions process for magnet schools was tainted by unlawful racial preferencing. The child, who was denied admission to a magnet school for the highly gifted, alleged that his grades and test scores qualified him for entry, but that he was placed on a waiting list due to the board's practice of using lower standards for students who are Hispanic, black, or members of preferred minority groups. The federal trial court in Maryland held that the sibling, who had not yet applied to or been rejected by a magnet school, had standing, that the board and its members were state entities for Eleventh

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[96] Denno v. School Bd. of Volusia County, 182 F.3d 780 [136 Educ. L. Rep. 736] (11th Cir. 1999).

[97] West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp.2d 1223, 1225 [130 Educ. L. Rep. 1186] (D. Kan. 1998).

[98] Isaacs ex rel. Isaacs v. Bd. of Educ., 40 F. Supp.2d 335 [134 Educ. L. Rep. 166] (D. Md. 1999).

Amendment purposes, and that the Eleventh Amendment did not prevent the plaintiffs from suing individual state officials in their official capacities for injunctive relief.[99]

An African-American high school student sued her district and school officials arising in part out of an incident of racial harassment in which classmates placed a drawing on her desk of an African-American hanging from a tree by a rope around her neck. Despite the complaints of the student and her parents, the situation did not improve. After the student's locker was subsequently broken into, she alleged that she felt intimidated and unsafe when she saw others wearing confederate flags on their clothing at school. The student claimed that the district and its officials had long created, encouraged, accepted, and tolerated a racially hostile environment at the school. A federal trial court in California posited that while the student presented a title VI claim against the district and a state law claim for intentional discrimination under state law, the district and officials were entitled to immunity pursuant to state law on her negligence claims.[100]

High school students brought a section 1983 action claiming a violation of their Fourth Amendment rights when their principal-chaperone searched their hotel room during a class trip and discovered alcohol and significant quantities of marijuana. Prior to the trip, the students were specifically informed that they would be subjected to room checks. In addition, the principal collected signed permission slips from each student and his or her parent(s), stating that alcohol and/or drug use was absolutely forbidden. As the principal returned to his room, he smelled a strong odor of marijuana in the hallway. The principal then contacted security and was informed that hotel policy permitted adult chaperones to enter student rooms. A federal trial court in New York decided that it was constitutionally permissible for the principal to ask hotel security to open the students' rooms and to search them during a school-sponsored trip.[101]

Parents of a high school student challenged their son's grade of zero on a history project in which he copied text verbatim from a reference book. At the start of the course, the teacher distributed guidelines informing students that a violation could result in "[n]ullification of any/all points for [the] assignment in question."[102] He also received a handbook that defined plagiarism and provided that for a first offense, a student would receive a zero.

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[99] Rosenfeld v. Montgomery County Pub. Sch., 41 F. Supp.2d 581 [134 Educ. L. Rep. 834] (D. Md. 1999).

[100] Davison v. Santa Barbara High Sch. Dist., 48 F.Supp.2d 1225 [136 Educ. L. Rep. 291] (C.D. Cal. 1998).

[101] Rhodes v. Guarricino, 54 F. Supp.2d 186 [137 Educ. L. Rep. 258] (S.D.N.Y. 1999).

[102] Zellman v. Independent Sch. Dist., 594 N.W.2d 216, 218 [134 Educ. L. Rep. 1017] (Minn Ct. App. 1999).

The final project required the student to explain in his "own words and perspective" the events that took place during a decade. After the students submitted their projects, the teacher discovered that four individuals copied significant portions of their text verbatim from reference sources. An appellate court in Minnesota affirmed that while the handbook did not form a unilateral contract, the student did not have a protected liberty or property interest impaired by a charge of plagiarism, and that he received all of the process he was due.

In Indiana, a high school student and his parents sued their community school corporation and others over the alleged disclosure of information that violated their privacy rights under state and federal law. The parents had written a letter to the principal and all staff of the high school, urging that disclosure of information contained in the student's records would violate his privacy under the Family Education Rights and Privacy Act (FERPA). The letter specifically referred to removing the student from a teacher's class due to philosophical differences. When the student contacted colleges and scholarship granting organizations, he discovered that the letter was sent along with transcript information. An appellate court affirmed that the alleged violation of FERPA did not give rise to a private cause of action under section 1983, and that the school violated neither FERPA nor the student's federal or state constitutional right to privacy.[103]

Negligence

Two high school students sued their district and various officials, alleging that the sexual relationship a teacher had with them resulted in numerous federal constitutional and state statutory and common law violations. Pursuant to section 1983, the students alleged that the district acquiesced in or ratified the activities of the individual defendants, resulting in policies, customs, or practices that facilitated their having been sexually abused. In addition, the students filed state claims against the district for negligent hiring and retention of the teacher. A federal trial court in Illinois denied the district's motion for summary judgment on the first state claim because there was evidence suggesting that it rehired the teacher with some knowledge that he may have engaged in an extra-marital relationship with a student.[104] However, the court granted the district's motion for summary judgment on the other claims since it was immune under the state's Local Governmental Employees Tort Immunity Act.

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[103] Meury v. Eagle-Union Community Sch., 714 N.E.2d 233 [136 Educ. L. Rep. 1028] (Ind. Ct. App. 1999).

[104] Doe v. Board of Educ. of Consol. Sch. Dist. 230, 18 F. Supp.2d 954 [130 Educ. L. Rep. 184] (N.D. Ill. 1998).

In New York, a sixth grade student sued a city board of education on theories of respondeat superior and negligent failure to supervise for damages after he was sexually molested by a volunteer art teacher. The student claimed that the board was responsible for the acts of teachers and the principal who initiated and encouraged his contact with the volunteer. Alternatively, the student argued that the board was negligent in hiring and retaining the volunteer without performing an adequate background check. An appellate court maintained that the principal's failure to complete a background check on the volunteer, which was not a part of school policy, could not serve as the basis for a cause of action for negligent hiring.[105] In addition, the court reflected that the school's granting the volunteer permission to work with students was not the proximate cause of the child's injury.

A former student sued a school district to recover damages that he allegedly suffered when he was sexually abused by its curriculum director. The former student, who was thirty-seven at the time of trial, claimed that he was the victim of sexual abuse, both on and off of school property, over several years. The Supreme Court of Iowa affirmed that any alleged sexual abuse by the defendant did not occur within the scope of his employment, and that the district was not vicariously liable under respondeat superior.[106] The court further declared that the district was neither negligent in failing to prevent abuse nor was it liable under the theories of negligent hiring or negligent retention and supervision.

In New Jersey, a seventh grade student who allegedly sustained psychological injuries from harassment precipitated by classmates sued the board of education and various educators, alleging negligence, tortious conduct, and negligent supervision. The child claimed that classmates habitually teased and physically assaulted her because she was a good student. An appellate court rejected the board's claim that it was immune under state law on the basis that the law was not intended to protect public entities such as local school boards.[107]

A former student sued her school district alleging negligence, violations of the state Human Rights Act, and vicarious liability for the conduct of a former teacher with whom she had a sexual relationship. When the student broke off the relationship and reported it on the same day, the school suspended the teacher without pay pending an investigation. The teacher later resigned. At issue before an appellate court in Minnesota was whether the district's response to the allegations that the teacher engaged in inappropriate sexual activity with the student justified discretionary immunity from her negligence claim. The court affirmed that the district's choices as to method, manner, and extent of investigation of an anonymous tip alleging inappropriate teacher-student contact were policy matters entitled to discretionary immunity.[108]

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[105] Koran I. v. New York City Bd. of Educ., 683 N.Y.S.2d 228 [132 Educ. L. Rep. 170] (N.Y. App. Div. 1998).

[106] Godar v. Edwards and Marion Indep. Sch. Dist., 588 N.W.2d 701 [132 Educ. L. Rep. 173] (Iowa 1999).

[107] Hamel v. State, 728 A.2d 264 [134 Educ. L. Rep. 250] (N.J. Super. Ct. App. Div. 1999).

In Pennsylvania, a high school student sued his district, principal, and school nurse under section 1983 alleging that they failed to assist him after he was injured at school when he and a friend were stopped by two police officers for truancy. When a police officer ordered the student into an empty room, the student apparently did not do so as promptly as ordered and may have challenged the officer verbally, and the officer lifted the student off of the ground by his clothing and threw him across the tiled cement floor, severely injuring his face and jaw. After some time, one of the officers took the student to the school nurse. According to the student, the nurse failed to assist him or seek other medical attention. The student was taken to the principal's office, his mother was contacted, and he eventually underwent extensive treatment for his injuries. A federal trial court believed that the district was not liable based on either policy or lack of training, that the principal could not be liable where she did not see the student on the day of the alleged incident, that the nurse was not engaged in conspiracy with the police, and that she was not liable based on deliberate indifference.[109]

Other

The parent of a high school student sought to enjoin his son's suspension after he was excluded from school for five days for verbally assaulting another child and violating the school's sexual harassment policy. The student was walking in front of a female student who began mumbling and cursing under her breath. He turned around and told her to "stop talking jive and talk English so I can understand you." After the female struck him across the back of his head, he said, "what are you doing you stupid ho."[110] The female student then slapped him across the face. The principal suspended the female for five days, and then met with the male to question him about the incident. Later that day, the principal met with the student and his father who asked for, but did not receive, a written notice of the suspension.

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[108] Doe v. Park Center High Sch., 592 N.W.2d 131 [134 Educ. L. Rep. 307] (Minn. Ct. App. 1999).

[109] Woodson v. City of Philadelphia, 54 F. Supp.2d [137 Educ. L. Rep. 268] (E.D. Pa. 1999).

[110] Eason v. Independent Sch. Dist. No. 11, 598 N.W.2d 414 , 416 [137 Educ. L. Rep. 373] (Minn. Ct. Ap. 1999).

That afternoon, the father obtained a temporary restraining order preventing his son's suspension. An appellate court in Minnesota was of the opinion that the Pupil Fair Dismissal Act did not create a private cause of action or permit judicial review of suspensions, and that the factors governing a request for injunctive relief conclusively weighed against issuing a temporary injunction.

Tort Liability

Most of the cases falling under the rubric of tort liability dealt with personal injuries sustained by students or other invitees on school grounds. In these cases, the courts had to consider whether districts should be granted immunity.

A mother sued a district in Georgia after her child fell from playground equipment while attending an after school childcare program. An appellate court affirmed that the immunity, which protects districts and their officials, applies equally to claims of negligence and nuisance.[111] Conversely, an appellate court in Illinois did not apply tort immunity where the mother of a middle school student sued a district on theories of negligence and willful and wanton conduct to recover for personal injuries her child suffered in a shop class. The court determined that the statutory immunity enjoyed by teachers does not extend to districts where a complaint alleges independent negligence on its part.[112]

The mother of a fourth grade student filed suit on behalf of her daughter against their district to recover for injuries the child sustained when she fell on a sidewalk in front of her school. The mother unsuccessfully argued that the injury was due to the officials' failure to supervise her daughter properly. An appellate court in New York affirmed that the district's alleged failure to supervise the student was not the proximate cause of her fall, which occurred as she intentionally stepped on snow.[113] The court pointed out that the student fell because her spontaneous and voluntary stepping on the snow led to an injury that could have happened even if she had been supervised.

When an eleven-year-old student was struck by a truck while crossing the street on which his school bus stop was located, his mother sued the board and bus driver. An appellate court in Louisiana was satisfied that the board and bus driver did not owe the student a duty to ensure that he reach the designated bus stop safely prior to its arrival to pick him up and transport him to school.[114]

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[111] Dollar v. Dalton Public Sch., 505 S.E.2d 789 [130 Educ. L. Rep. 330] (Ga.App. 1998).

[112] Courson v. Danville Sch. Dist. No. 118, 704 N.E.2d 447 [131 Educ. L. Rep. 1073] (Ill. App. Ct. 1998).

[113] Banks v. City Sch. Dist. of Albany, 682 N.Y.S.2d 474 [131 Educ. L. Rep. 1080] (N.Y. App. Div. 1999).

A personal injury victim sued a board for damages arising out of an accident that took place while she attended a school event sponsored by a Parent-Teacher Association (PTA). The board, which encouraged the use of school facilities by the community and implemented rules and regulations for doing so, purchased liability insurance for the event. However, the PTA did not complete the facility use application, pay an application fee, execute a save harmless agreement, or provide proof of liability insurance. An appellate court in North Carolina affirmed that the PTA's failure to follow the board's rules precluded its being entitled to immunity.[115] The court commented that even though state law permits a local board to waive its immunity by securing liability insurance, purchasing insurance does not constitute a waiver where personal injuries are sustained in the use of school property if the use is for other than school purposes and pursuant to an agreement with a non-school group that is consistent with the local board's rules and regulations.

The parents of a second grade student who died while attempting to enter his home through a window sued their school district for negligently failing to supervise its employees and insisting that prescribed routes be followed every day. On the day of his injury, the child arrived home approximately thirty minutes early because the bus driver modified her route due to the absence of two students. When it appeared that no one was home, the driver considered keeping the child on the bus, but allowed him to leave when he assured her that he had a key. Apparently the child did not have a key, because he tried to climb in the house through his bedroom window. When the window closed on the child's back, it pinned him between the window and the sill. Upon returning home, the father rushed his unconscious son to the hospital where he died five days later. The Supreme Court of Ohio observed that the district waived its right to a statutory immunity defense but that a genuine issue of material fact existed as to whether the driver violated the statute prohibiting school bus drivers from starting their busses until after the children leaving them have reached a place of safety.[116]

An eighty-two-year-old invitee filed suit pursuant to state law against a district to recover damages for injuries she sustained in a fall on school premises. The woman alleged that she fell in the multipurpose room of a school when she walked into an open entryway where an unmarked and unguarded ramp or floor riser was present. The Supreme Court of Nebraska found that the woman's statements to the school nurse that she did not see the step and fell, when considered together with circumstantial evidence at the accident scene, supported the inference that her fall was caused by an unmarked and unguarded floor riser.[117] The court added that as a matter of law, the discretionary function exemption in the statute did not apply.

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[114] Cavalier v. Gary Brent Ward, State Farm Mutual Automobile Ins. Co., Ellen Sanders and the East Baton Rouge Parish Sch. Bd., 723 So.2d 480 [131 Educ. L. Rep. 1166] (La. Ct. App. 1998).

[115] Seipp v. Wake County Bd. of Educ., 510 S.E.2d 193 [132 Educ. L. Rep. 234] (N.C. Ct. App. 199).

[116] Turner v. Central Local Sch. Dist., 706 N.E.2d 1261 [132 Educ. L. Rep. 909] (Ohio 1999).

Parents brought a personal injury action against a district on behalf of their daughter, who was sexually assaulted by an intruder in a school locker room. The parents alleged that the district failed to provide adequate supervision, protection, and security or to enact or enforce appropriate security policies. Prior to the assault, school employees noticed the assailant on the premises but failed to question him about his presence. An appellate court in Minnesota affirmed that while the school employees who noticed the intruder prior to the incident were entitled to official immunity, the district was not entitled to vicarious immunity.[118] The court reasoned that to have ruled otherwise would have been to reward the district for its failure to develop and implement a basic security policy.

Claims and Suits Against the School District

Constitutional Rights

In the first of five cases against school districts involving potential violations of the Establishment Clause, a student and her parents brought a section 1983 action against a board in Texas, alleging that her history teacher passed out fliers in class advertising a Baptist religious revival. The other claim centered on the board's permitting students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. The Fifth Circuit decreed that the version of the policy permitting students to deliver sectarian and proselytizing prayers violated the Establishment Clause.[119] The court also contended that the version of the policy allowing students to give only nonsectarian, nonproselytizing prayers at graduation ceremonies violated the Establishment Clause when extended to permit such prayers over the public address system at football games.

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[117] Parker v. Lancaster City Sch. Dist. No. 001, 591 N.W.2d 532 [133 Educ. L. Rep. 1025] (Neb. 1999).

[118] S.W. v. Spring Lake Park Dist. No. 16, 592 N.W.2d 870 [134 Educ. L. Rep. 566] (Minn. Ct. App. 1999).

[119] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 [132 Educ. L. Rep. 687] (5th Cir. 1999).

Similarly, students in Florida sued their school board alleging that its policy of permitting members of the graduating class to vote on whether to have unrestricted student-led messages at the beginning and closing of commencement exercises violated the Establishment Clause. Prior to *Lee v. Weisman*,[120] the district permitted religious officials to conduct formal prayers during graduation exercises. Following *Lee*, the superintendent issued a memo instructing all school officials to end the practice. Shortly thereafter, the superintendent issued a memo setting forth guidelines for student initiated and led prayers. Insofar as the board never voted specifically on the guidelines, they were left in force with its acquiescence or tacit approval. The Eleventh Circuit struck the policy down on the basis that it amounted to a facial violation of the Establishment Clause under either *Lee* or *Lemon*.[121]

Parents and students in Idaho sued their school board seeking declaratory and injunctive relief with respect to its policy of permitting selected students to give presentations, including prayers, during high school graduation programs. The families alleged that the policy violated the Establishment Clause, and that they had standing to challenge it as students and taxpayers. The Ninth Circuit was of the view that the parents did not have standing either as taxpayers or on the basis that they were deprived of the right to attend public events after their children graduated. Further, the court asserted that since the students graduated, the requests for injunctive and declaratory relief were moot.[122]

Students and their parents sued their district in Texas over the constitutionality of its "Clergy in Schools" volunteer counseling program. Under the program, individual members of the local clergy were invited to schools to provide volunteer counseling to students. School officials actively recruited selected area clergymen, the vast majority of whom were Protestants. District administrators trained the volunteers, instructing them not to discuss religion, quote religious materials, provide information about church services, identify their church affiliations, or wear distinctive garb revealing their affiliations. The Fifth Circuit wrote that the program violated the Establishment Clause under *Lemon*, both as having the primary effect of advancing religion and as excessively entangling government with religion.[123] In addition, the court relied on the coercion and endorsement tests in striking the program down as unconstitutional.

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[120] Lee v. Weisman, 505 U.S. 577 [75 Educ. L. Rep. 43] (1992).

[121] Adler v. Duval County Sch. Bd., 174 F.3d 1236 [134 Educ. L. Rep. 790] (11th Cir. 1999).

[122] Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 [135 Educ. L. Rep. 387] (9th Cir. 1999).

An advertiser in California sued a school district alleging that it violated his state rights to free speech and free exercise of religion by terminating an advertising sponsorship program benefitting a high school baseball team. At issue was whether a public school's rejection of a sign featuring the Ten Commandments, which the advertiser submitted in response to a fund-raising solicitation for commercial advertisements on a baseball field, violated his right to free speech. An appellate court affirmed that the state Establishment Clause prohibited the district from posting the advertisement, and that had it done so, it would have involved excessive government entanglement with religion.[124] The court noted that the advertiser's freedom to practice his religion was not unconstitutionally abridged by the district's refusal to post the sign, and that any such limit was outweighed by the state's compelling interest in acting in accordance with Establishment Clause structures. Finally, the court remarked that rejection of the advertisement did not implicate the advertiser's state constitutional free speech rights and was an act of discretion entitling district officials to statutory immunity.

A special education student in New Mexico was driven home from school, following a suspension, without his parents being notified. Upon arriving home, the student committed suicide. The parents sued their district alleging that it and various officials violated their son's civil rights. The Tenth Circuit held that school officials were not liable for violating due process based on any special relationship with the student.[125] At most, the court acknowledged that the student was confined in a counselor's car during the drive home from school, and that even if such circumstances constituted a custodial relationship, it ended once he exited the vehicle and ran to his house, at which point he was no longer under any involuntary restraint by a school official.

A resident of a school district in New Jersey unsuccessfully sought to have her niece admitted to its high school without having to pay tuition. The resident challenged the board's policy as arbitrary, capricious, and as violating the state constitution. The resident further claimed that the letter the board sent her notifying her of its refusal to accept her niece denied her due process of law. An appellate court in New Jersey affirmed that since the resident satisfied the statutory requirements by submitting a sworn statement that she lived within the district and was supporting her niece because her mother was incapable of doing so, the student was entitled to attend the high school.[126] The court also ascertained that the board violated the due process rights of both the resident and her niece by excluding the child from the high school without informing her of its justification for doing so.

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[123] Doe ex rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274 [134 Educ. L. Rep. 52] (5th Cir. 1999).

[124] DiLoreto v. Board of Educ. of the Downey Unified Sch. Dist., 87 Cal.Rptr.2d 791 [136 Educ. L. Rep. 981] (Cal. Ct. App. 1999).

[125] Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253 [130 Educ. L. Rep. 496] (10th Cir. 1998).

Voting Rights Act

Hispanic citizens of a school district in Texas and an unincorporated association sued the district and individual board members, challenging their at-large voting system for electing members of the board as invalid under the Voting Rights Act (VRA). The plaintiffs claimed that Hispanic participation in board elections was limited by the use of staggered terms without single-shot voting, the large population of the district, the comparatively small number of polling places, the absence of minorities as election officials, and economic disparities between the Anglo and minority communities. The Fifth Circuit affirmed that since the plaintiffs could not make a threshold showing that a group whose vote was allegedly diluted was sufficiently large and geographically compact so as to constitute a majority in any single member district, the at-large election system did not violate the VRA.[127]

Voters in a Texas school district claimed that the at-large, by-place, majority-vote elections for positions on the board diluted their votes as Hispanics in violation of the VRA. The issue before the Fifth Circuit was whether the plaintiffs could prove that Hispanics are a sufficiently large and geographically compact group to constitute a majority in a single-member district. The court affirmed that the voters had to prove the minority group exceeded fifty percent of the relevant population in the district as a threshold requirement, and that the report of the district's expert was clear and convincing in the demonstration of sufficient post-census demographic changes to erode the Hispanic majority there.[128]

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[126] J.A. v. Board of Educ. for the Dist. of South Orange and Maplewood, 723 A.2d 1270 [132 Educ. L. Rep. 498] (N.J. Super. Ct. App. Div. 1999).

[127] Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368 [131 Educ. L. Rep 934] (5th Cir. 1999).

[128] Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 [132 Educ. L. Rep. 718] (5th Cir. 1999).

Other Claims

A support organization of homosexual high school students sued their board for allegedly denying them an opportunity to meet on school premises during non-instructional time in violation of the limited open forum protections afforded non-curriculum-related pupil organizations under the Equal Access Act (EAA). In pursuit of its request for a preliminary injunction, and in order to show the existence of a limited open forum within the meaning of the EAA, the group argued that there were several non-curricular student groups at the high school. The federal trial court in Utah denied the request for a preliminary injunction on the basis that the group was unlikely to prevail on the merits of its claim.[129] However, the court did not address whether a limited open forum existed at the high school in light of the narrow and specific grounds raised in the motion.

In the first of two cases from New York, a teachers' union filed a demand for arbitration after an administrative rejection of its grievance that a district violated the parties' bargaining agreement by subcontracting with the Board of Cooperative Educational Services (BOCES) to staff positions. An appellate court affirmed that because the question of whether the district could subcontract with BOCES was outside the scope of the collective bargaining agreement, it could not be required to arbitrate an issue it could not be compelled to negotiate in the first instance.[130]

A student who was injured in a fight with another pupil that occurred after school was dismissed and off school property sued the district for her injuries. An appellate court in New York affirmed that the student, who admittedly delivered the first blow, could not recover from the district for her injuries.[131] The court indicated that a student who removes herself from school grounds may no longer look to the district for protection.

County residents sought a declaratory judgment, mandamus, and injunctive relief to prevent construction of a new high school. The residents claimed the district violated the state Environmental Policy Act and failed to comply with a local referendum authorizing the project. The Supreme Court of Georgia affirmed that the district was not a governmental agency required to prepare an environmental effects report under the statute, and that it had the authority under the referendum to demolish the existing school or spend more than estimated on a new one.[132]

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[129] East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist., 30 F. Supp.2d 1356 [131 Educ. L. Rep. 1008] (D. Utah 1998).

[130] Newfield Central Sch. Dist. v. Newfield Cent. Sch. Teachers Ass'n, 686 N.Y.S.2d 125 [133 Educ. L. Rep. 567] (N.Y. App. Div. 1999).

[131] Youngs v. Bay Shore Union Free Sch. Dist., 686 N.Y.S.2d 444 [133 Educ. L. Rep. 1008] (N.Y. App. Div. 1999).

[132] Thornton v. Clarke County Sch. Dist., 514 S.E.2d 11 [134 Educ. L. Rep. 374] (Ga. 1999).

Parents of a gifted student who did not receive a specialized education program until the fifth grade, despite placing in the top five percent nationally for mathematics, reading, and language, became wary of their child's curriculum and requested a meeting to formulate an Individualized Education Program (IEP). When school officials and the parents failed to agree on an IEP, a due process appeals panel ordered the district to provide the child with compensatory education and to reevaluate him since he was denied a free appropriate public education. An appellate court in Pennsylvania concluded that the appeals panel exceeded its authority in fashioning a remedy that required college-level instruction, private tutoring, and/or education beyond the curricular offerings at the student's school.[133]

School Safety

Schools are now being sued for failing to maintain security on school grounds. In addition, district policies regarding safety on campuses and at school events have been the source of litigation.

The mother of a high school student who was attacked and killed at school sued the town, educators, and municipal officials for failure to maintain security and protect her son. The student was stabbed to death at school by three armed individuals, at least one of whom was not a student of the school. The essence of the mother's claim was that the school's lack of security violated a state statute that requires each district to implement and publish policies including standards and procedures to ensure building security and safety of students and personnel. Apparently, school officials did not take any action in response to a warning from other students that the assailants had threatened to return to the school and retaliate against the individuals who were involved in a prior altercation. At the time the plaintiff's son was stabbed, the school's security standards and procedures consisted of a no-trespassing sign and a sign asking visitors to report to the main office. The Supreme Judicial Court of Massachusetts was convinced that the town, school officials, and municipal officials were immune from suit, and that they did not have a duty to protect the student from private actors.[134]

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[133] Brownsville Area Sch. Dist. v. Student X, 729 A.2d 198 [134 Educ. L. Rep. 534] (Pa. Commw. Ct 1999).

[134] Brum v. Town of Dartmouth, 704 N.E.2d 1147 [131 Educ. L. Rep. 829] (Mass. 1999).

Zero-Tolerance Policies

A seventh grade student asserted that his substantive and procedural due process rights were violated when he was expelled from school for one year for possession of a Swiss army knife. The student found the knife in the hallway, used the file on it to repair a fingernail, and turned it over willingly when asked to do so. A hearing examiner, while offering that the expulsion was harsh, claimed that he lacked discretion to make an exception to the district's zero tolerance policy for weapons. A trial noted that while the zero tolerance policy had been adopted by a board vote, the policy was never put into writing. An appellate court in Pennsylvania affirmed that the board exceeded its authority in adopting the zero tolerance policy because it denied the superintendent, the board, and students the discretion specifically provided by the statute, allowing the superintendent to modify, on a case-by-case basis, expulsions for individuals who possess weapons.[135]

A high school football player sued his school board alleging that it violated his due process rights when he was barred from participating in interscholastic athletics for violating its zero tolerance drug and alcohol policy. The student agreed in writing to abide by the school conduct code's ban on alcohol and drug use. Following an incident during which the student admitted alcohol consumption to police officers, they reported it to school officials pursuant to a reciprocal reporting agreement. In weighing what the officers and the student told him, an assistant principal decided that the student violated his commitment to remain alcohol-free. Further, since the student had previously violated the code, he was suspended from athletics for a period that encompassed the entire football season. An appellate court in Illinois affirmed that despite his potential ability to obtain an athletic scholarship to college, the student did not have a protected interest in participating in interscholastic athletics, and that school officials did not act arbitrarily or capriciously in using confidential information disclosed by police officers.[136]

Firearms

A middle school student who was charged with possession of a weapon on school property, carrying a firearm without a license, possession of a firearm by a minor, and altering or obliterating marks of identification filed a pretrial motion to suppress evidence obtained following an investigation by school officials. The first of three issues before an appellate court in Pennsylvania was whether educators acted as agents of the police when they conducted an investigation after being informed by the police that a student may have had a gun on school property. In addition, the court had to evaluate whether educators had to possess reasonable suspicion, supported by specific and articulable facts, before they could detain and question a student about an anonymous rumor that he possessed a gun on school premises. Finally, the court had to resolve whether educators had to furnish the student with Miranda warnings before questioning him about conduct that violated both the law and school rules. The court determined that the school officials were not agents of the police when they conducted the investigation, that they did not need reasonable suspicion before detaining and questioning the student about an anonymous rumor that he had a gun at school, and that he was not entitled to Miranda warnings.[137]

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[135] Lyons v. Penn Hills Sch. Dist., 723 A.2d 1073 [132 Educ. L. Rep. 490] (Pa. Commw. Ct. 1999).

[136] Jordan v. O'Fallon Township High Sch. Dist. No. 203, 706 N.E.2d 137 [133 Educ. L. Rep. 214] (Ill. App. Ct. 1999).

In Texas, a student who brought a gun on school property challenged his being transferred from his regular classes to an alternative education program (AEP). When a Deputy Sheriff discovered a short-barrel pump shotgun in the student's pickup truck in the school parking lot, he claimed that he forgot to take it out after a weekend hunting trip. After being suspended, the student appealed, but pursuant to district policy, the board's inaction had the effect of upholding the superintendent's action. Subsequently, the student obtained an injunction permitting him to return to his regular courses based on his allegation that his rights to due process under the state and federal constitutions were violated because he did not receive a full hearing. In vacating the injunction, an appellate court in Texas ruled that the transfer to evening AEP classes on campus was not an expulsion from the student's regular campus, and that the board's affirmation of the transfer was final and unappealable.[138]

Conclusion

Clearly, the many suits brought against governing bodies of public schools include a broad range of legal issues. While some of the litigation discussed in this chapter, such as challenges to the Open Meetings Acts, occur on a consistent but limited basis, others will begin to increase as school districts and their governing entities are expected to take on additional responsibilities. School safety and student harassment will be two of the most litigated issues over the next few years as society learns to cope with the potential for violent student offenders, limited tolerance, and the ability to sue school governing boards for student-on-student harassment. The future of the public schools will also be tested in the areas of equity, impacting desegregation, school finance, and vouchers.

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[137] In re D.E.M., 727 A.2d 570 [133 Educ. L. Rep. 990] (Pa. Super. Ct. 1999).

[138] Aledo Indep. Sch. Dist. v. Reese, 987 S.W.2d 953 [133 Educ. L. Rep. 1078] (Tex. App. 1999).

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PUPILS

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Introduction

Federal and state courts addressed issues impacting all aspects relating to students. Race conscious admissions policies continued to be questioned. The courts grappled with issues concerning prayer in school and related activities as the judiciary attempts to balance the demands of the Establishment Clause against free speech and freedom of expression. The courts gave latitude to districts pertaining to discipline and searches of students. Sexual harassment cases presented prominent issues, typically supporting districts that take affirmative remedial steps. Desegregation issues occupied judicial attention as school districts remain under supervision after years of monitoring. This chapter focused on the variety of issues concerning students and schools.

Issues Relating to Public School Attendance

Compulsory Attendance

Based on undisputed evidence that a student was absent from school for nine days during a semester, school officials petitioned a Family Court to adjudicate her as a person in need of supervision for truancy. The petition was granted and the student was placed on probation for one year; the student appealed. An appellate court in New York affirmed the finding of truancy since there was abundant support in record.[1]

A mother was convicted for violating the District of Columbia Compulsory Attendance Act where her daughter attended only one day of school over the past year and less than two weeks during the current year. The mother challenged her conviction on the ground that the law was vague and the trial court refused her request for a child psychologist at state expense to review her daughter's condition. An appellate court upheld the law as not vague and as providing the mother with adequate notice of her required conduct. However, the court did remand the issue of providing a child psychologist since the mother's claim that her child had school phobia would be pertinent to the defense.[2]

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[1] In re Shena SS, 693 N.Y.S.2d 313 [137 Educ. L. Rep. 328] (N.Y. App. Div. 1999).

[2] Brown v. District of Columbia, 727 A.2d 865 [134 Educ. L. Rep. 206] (D.C. 1999).

In Wisconsin, the parents of a minor student brought a wrongful death action against a district and its insurer, seeking recovery for his suicide while truant from the school. Although the student's father had driven him to school, the student did not remain. His body was later discovered by a classmate in her closed garage where he had doused himself with gasoline and set himself on fire. The parents claimed that the district officials breached a duty to notify them and to follow up after a counselor learned that their son was despondent and absent from school. In affirming in favor of the district, an appellate court asserted that even if the officials had a duty to notify the parents or to follow up on the report to the counselor that the student was despondent, his suicide was an intervening and superseding cause that was too remote from the negligence to render it liable.[3]

Where a student was removed from a geometry class for excessive tardiness, he was referred to the assistant principal who first gave him detention and eventually met with his mother before being assigned to a study hall. When the class was removed from the student's record, he claimed that the school tardiness policy conflicted with the Indiana Student Discipline Act . An appellate court affirmed that since the removal was by the principal's designee, it was appropriate. In response to his claim that school officials did not follow all policies listed in the student handbook, they admitted not doing so but maintained that the procedures used were sufficient. The court also affirmed that the procedures used could be substituted for the requirements and that they provided sufficient due process.[4]

After two middle school students in Washington continuously missed school, officials filed contempt motions against them with the result that they were ordered to attend school. The trial court found the students in contempt and sentenced them to seven days detention which would be suspended upon complying with the court order. On further review, an appellate court affirmed that the students' due process rights did not require an appointed counsel at the initial hearing.[5]

In Florida, the Department of Health refused a mother's request that her daughter be declared exempt on religious grounds from immunization requirements for admission to public schools. The mother decided not to pursue administrative review and obtained declaratory and injunctive relief. An appellate court affirmed that the language of the statute did not require the mother to substantiate the religious grounds for her request or to exhaust administrative remedies.[6] However, the court denied the mother's request for attorney fees since she chose not to pursue administrative relief.

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[3] McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875 [136 Educ. L. Rep. 568] (Wis. Ct. App. 1999).

[4] M.S. v. Eagle-Union Commun. Sch. Corp., 717 N.E.2d 1255 [138 Educ. L. Rep. 907] (Ind. Ct. App. 1999).

[5] Perkins v. State, 969 P.2d 1101 [131 Educ. L. Rep. 852] (Wash. Ct. App. 1999).

Home Schooling

The Supreme Judicial Court of Massachusetts vacated an order requiring parents to allow home visits by school administrators as a condition of providing home education.[7] The committee had approved the parent's certification in elementary education, the proposed curriculum, and the time to be spent on instruction. The court stated that since home visits were not essential to the state's interest as a condition for home schooling, and as long as the plans continue to comply with state standards, the plan had to be approved.

In a second case from Massachusetts, where parents refused to provide the essentials of education plans for home-schooling for their children or to allow evaluation of their educational attainment, a local school committee initiated proceedings requesting a petition of care and protection. An appellate court affirmed the placement of the children under the temporary care of the Department of Social Services since the parents refusal to provide the committee with the bare essentials of their plan supported the determination that the children were in need of care and protection.[8]

Where a superintendent in Ohio refused to grant a parental request to home school two of their children even though a juvenile court ordered the children to attend public school, the parents sought further review. An appellate court indicated that despite the earlier order, the superintendent was statutorily obligated to act upon the parents' notification of their wish to home school their children.[9]

Transfer of Students

A white student was refused admission to the Boston Latin School (BSL), one of three examination schools in Boston. The city had been under desegregation orders for over two decades that required the BSL to ensure at least thirty five percent of each entering class would be made up on African-American and Hispanic students. In 1987, the federal trial court im

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[6] Department of Health v. Curry, 722 So-2d 874 [131 Educ. L. Rep. 870] (Fla. Dist. Ct. App. 1998).

[7] Brunelle v. Lynn Pub. Schs., 702 N.E.2d 1182 [130 Educ. L. Rep. 1322] (Mass. 1998).

[8] In re Ivan, 717 N.E.2d 1020 [138 Educ. L. Rep. 511] (Mass. App. Ct. 1999).

[9] Carroll v. Wright, 704 N.E.2d 1279 [131 Educ. L. Rep. 850] (Ohio Ct. App. 1997).

Massachusetts found that Boston achieved unitary status for student assignments and no longer required BLS to continue the thirty five percent admission requirement. The district continued this practice until 1995 when the system of admissions was successfully challenged by a student. A task force was formed which developed the current guidelines involving the use of an examination combined with a racially and ethnically conscious admission policy. The federal trial court ruled in favor of the city but, on further review, the First Circuit reversed on the basis that the policy could not be justified on the basis of past discrimination.[10] In ordering the student's immediate admission, the court added that the issue of diversity was not compelling and that the policy violated the equal protection guarantees of the Fourteenth Amendment.

In another case from Massachusetts, plaintiffs sought to enjoin a district's student assignment plan that relied on race. The federal trial court recognized that issue presented a fair challenge on the evolving law of equal protection since the law was unclear and the remedy was not obvious even though race-preferential remedies have been questioned.[11] The court further reflected that this challenge was not brought by a renegade group and the plan had been developed from the efforts of men and women of good will. The court denied injunctive as inappropriate considering the significance of the issues and the substantial disruption that it would have caused. The court did state that the litigation should proceed to determine the issues of constitutionality.

Parents in New York sought a preliminary injunction when their daughter was denied a transfer, based solely on race, to a suburban elementary school under an interdistrict transfer program even though she had previously been accepted was invited to an orientation session. The court granted the parents' motion based on likelihood of success on their claim that the transfer plan was unconstitutional.[12]

In Maryland, parents of a first-grade student sued a school system for injunctive and monetary relief over its voluntary transfer policy involving a magnet school that used race as one factor in the consideration of transfers. The parents' request to have their son admitted was rejected because of the impact on diversity. Even though the district was never under a court order to desegregate, the court stated that the diversity interest remained a compelling governmental interest.[13] The Fourth Circuit subsequently reversed and ordered the district to admit the student to the magnet school since its use of racial classifications in its transfer policy as insufficiently narrowly tailored to the interest of achieving diversity.[14]

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[10] Wessman v. Gittens, 160 F.3d 790 [130 Educ. L. Rep. 1009] (1st Cir. 1998).

[11] Boston's Children First v. City of Boston, 62 F. Supp.2d 247 [138 Educ. L. Rep. 776] (D. Mass. 1999).

[12] Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp.2d 619 [132 Educ. L. Rep. 304] (W.D.N.Y. 1999).

[13] Eisenberg v. Montgomery County Pub. Schs., 19 F. Supp2d 449 [130 Educ. L. Rep. 572] (D. Md. 1998).

Two white students in Maryland who claimed racial preferencing tainted the selection process for district magnet schools sought injunctive relief a variety of federal claims. The federal trial court rejected the students' claims under the Equal Protection Clause or under section 1983. However, the court, rejecting the district's argument that it had Eleventh Amendment immunity for suits under title VI, permitted the action to proceed.[15]

A high school student in Texas sued her district, challenging its policy of requiring students transferring from non-accredited or home schools to pass proficiency exams at their own expense in order to receive credit toward graduation. The federal district court held that since the policy did not burden the free exercise of religion, it was a valid, religion-neutral policy of general application.[16] Further, the court also applied a rational basis analysis in reviewing this equal protection challenge, determining that the policy was rationally related to a legitimate state interest in setting uniform public school advancement and graduation requirements.

Where a university in California operates an elementary school as a research laboratory to study issues relevant to the education and social development of children in multicultural and urban communities, it shares its research throughout the state. Insofar as the school's admissions process considers gender, race, and family income, parents unsuccessfully sued claiming that it violated the Equal Protection Clause and title VI when their daughter was not accepted into the school claiming The Ninth Circuit affirmed that since there was a compelling state interest in providing effective education in urban schools, the use of race and ethnicity in admissions was narrowly tailored to serve this purpose.[17]

Tuition and Fees

Where a student moved in with an aunt after her mother died, the latter requested that she student be admitted to a local public school without having to pay tuition. After the local board denied this request, State Board of Education decided that the niece was entitled to a free education. On further review, an appellate court in New Jersey affirmed that the niece was entitled to enter school without paying tuition on the basis that it violated her due process rights.[18]

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[14] Eisenberg v. Montgomery County Pub. Schs., 197 F.3d 123 [140 Educ. L. Rep. 88] (4th Cir. 1999).

[15] Rosenfeld v. Montgomery County Pub. Schs., 41 F. Supp.2d 581 [134 Educ. L. Rep. 834] (D. Md. 1999).

[16] Hubbard by Hubbard v. Buffalo Indep. Sch. Dist., 20 F. Supp.2d 1012 [130 Educ. L. Rep. 647] (W.D. Tex. 1998).

[17] Hunter *ex rel.* Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 [138 Educ. L. Rep. 127] (9th Cir. 1999).

In a second case from New Jersey, a school board sought three years of tuition costs for a student who was not a legal resident of the district. The student had attended school in the district where his grandfather lived even though he did not live with his grandfather. An appellate court concluded that the district could collect only for the year that the student remained in school while his grandfather challenged the action of the Commissioner of Education but that he was not liable for tuition for the years that preceeded the board's denial of the child's admission costs.[19]

A school district in Pennsylvania unsuccessfully challenged an order that a student who lived with his mother and brother in a leased town-house qualified as a resident. The family residence was in a neighboring community but the mother had moved to be nearer the brother's private school. When the child became sick for an extended period, the mother followed the advice of experts who suggested that she enroll her son in a private school for individuals with learning disabilities. An appellate court affirmed that the district had to pay the tuition since the student qualified as a resident.[20]

In Illinois, a school district challenged an order that it owed tuition reimbursement to another system for an expelled student who received educational services there while being treated in a residential facility. The district which expelled the student for possessing a controlled substance on school grounds claimed that since he could not attend class there during his expulsion, it did not owe tuition reimbursement. An appellate court affirmed that since the law requiring educational services for students in treatment programs did not conflict with the statute establishing expulsion proceedings for students who possess drugs or weapons were not in conflict, the first district was required to reimburse the service provider.[21]

Where a trial court granted a mother's motion to change the guardianship of her daughter to an aunt for the purpose of attending school without paying tuition even though she did not live with the aunt, a school district in Ohio sought further review. An appellate court reversed in stating that since the student did not meet the residency requirements, her family had to pay tuition.[22]

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[18] J.A. v. Board. of Educ. for S. Orange, 723 A.2d 1270 [132 Educ. L. Rep. 498] (N.J. Super. Ct. App. Div. 1999).

[19] Woodbury Hts. Bd. of Educ. v. Starr, 725 A.2d 1180 [133 Educ. L. Rep. 196] (N.J. Super. Ct. App. Div. 1999).

[20] Thane v. Cumberland Valley Sch. Dist., 724 A.2d 978 [132 Educ. L. Rep. 832] (Pa. Cmwlth. 1999).

[21] Carbondale Comm. High v. Herrin Comm. Unit, 708 N.E.2d 844 [134 Educ. L. Rep. 538] (Ill. App. Ct. 1999).

The District of Columbia Court of Appeals remanded a case over tuition.[23] When the district sought to determine residency of a student who attended an elementary school, his father failed to respond to a letter advising him that tuition was due. Subsequently, a hearing officer decided that the child was not a resident and the superintendent's office dismissed his appeal as untimely. On further review over the question of the date that the appeal officer's decision was sent, the court noted that apparent negligence of the district made it difficult to determine when the letter was sent.

Private and Parochial Students

The Supreme Court of Virginia reversed an order awarding damages based on the violation of a tuition agreement between a private school and parents of student.[24] The parents had signed a contract with school officials stipulating that unless they withdrew their daughter by June 1 prior to the beginning of school, they would be obligated to pay the entire year's tuition. When the parents refused, a trial court granted the school's motion for summary judgment as to damages. On appeal, the High Court concluded that the trial judge erred in failing to evaluate whether there was a valid liquidated damages clause. The court thus reversed and remanded in order to permit the parents to proceed to discovery with regard to their defense that the liquidated damages clause was an enforceable penalty. In addition, the court noted that the school had to prove that it suffered actual damages in its breach of contract action.

In New Jersey a student sued a private school for his expulsion from the school in March of his senior year. Officials expelled the student after he was involved in numerous incidents including a probation period during the fall. The court denied the school's motion for summary judgment. An appellate court reversed this decision and dismissed the complaint determining that the expulsion was not a "state action" within the meaning of federal and state due process requirements.[25] The court found the school had followed its procedures and that they were "fundamentally fair."

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[22] In re White, 715 N.E.2d 203 [137 Educ. L. Rep. 361] (Ohio Ct. App. 1998).

[23] Zollicoffer v. DC Pub. Schs., 735 A.2d 944 [137 Educ. L. Rep. 750] (D.C. 1999).

[24] O'Brian v. Langley Sch., 507 S.E.2d 363 [130 Educ. L. Rep. 1358] (Va. 1998).

[25] Hernandez v. Bosco Preparatory High, 730 A.2d 365 [135 Educ. L. Rep. 181] (N.J. Super. Ct. App. Div. 1999).

A claimant in Illinois unsuccessfully sued a religious secondary school, seeking damages for alleged sexual abuse which occurred while he was a student sixteen years earlier. An appellate court affirmed that claimant's autism, attention-deficit hyperactivity disorder, and post-traumatic stress syndrome were insufficient to establish "a legal disability" and thus did not toll the statute of limitations.[26]

In Georgia, a former high school student sued a private school and teacher under title IX and state tort law based on sexual abuse by the teacher. A federal trial court dismissed for want of subject matter jurisdiction and alternatively granted summary judgment on ground of limitations, and the student appealed. The Eleventh Circuit affirmed the summary judgment on the basis that the private school's tax-exempt status constituted "federal financial assistance" so as to make it subject to title IX was neither immaterial nor wholly frivolous, and thus the district court had subject matter jurisdiction.[27] It also stated that the state's two-year statute of limitations for personal injury actions applied and that her causes of action began to run under state law when she student attained the age of majority.

Substantive Rights of Students

First Amendment: Religious Rights

A nondenominational Christian children's club in New York, its administrator, and a member brought a section 1983 action against a public school district alleging that officials violated their free speech rights under the First Amendment by denying the club use of the school's cafeteria. The club alleged that its activities were a discussion of secular matters from a religious perspective, thus falling within the same genre as other clubs. The court noted that the club's activities were a conceptually distinct genre from the secular subject matter addressed by other clubs, specifically noting that the club is a Christian organization whose primary purpose is to instill and reinforce Christian faith and values in its members. In ruling in favor of the school, the federal district court ordered that the preliminary injunction in favor of the club be vacated and granted the school's motion for summary judgment.[28]

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[26] In Re Doe, 703 N.E.2d 413 [131 Educ. L. Rep. 1066] (Ill. App. Ct. 1998).

[27] M.H.D. v. Westminster Schs., 172 F.3d 797 [133 Educ. L. Rep. 774] (11th Cir.1999)

[28] The Good News Club v. Milford Cent. Sch., 21 F. Supp.2d 147 [130 Educ. L. Rep. 678] (N.D.N.Y. 1998).

In New York, the random acts of individual teachers without prior consultation or approval of the principal or other administrators resulted in court action. The parents and guardians of school children brought action against school officials seeking declaratory and injunctive relief under the First and Fourteenth Amendments and under the state constitution for alleged violations of their First Amendment rights. In this litigation, the plaintiffs sought to obtain judicial adoption of a single standard for the treatment of religion in the school system. In ruling for the plaintiffs, the federal district court concluded that: the teacher's requiring her students to construct the likenesses of the Hindu deity's elephant head was impermissible under the First Amendment; the school sponsorship of "worry dolls" was a violation of the First Amendment; and the school district's promotion of Earth worship and prayer to the Earth offended the First Amendment.[29] The court determined that guest lectures on rocks and minerals, reading the life of Buddha, reading a story about Quetzalcoatl as a part of a historical presentation concerning Mexico were conducted in such a fashion as to violate the First Amendment, but that a Drug Abuse Resistance Education (DARE) program was not a violation of the First Amendment.

Students and their parents filed an action against a school district alleging that it violated the Establishment Clause in light of the distribution of a flyer advertising a Baptist religious revival by a seventh grade history teacher and the practice of the district to allow students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games. The federal trial court ordered the district to implement a more restrictive version of its policies and entered a take-nothing judgment on the damages issue. On appeal, the Fifth Circuit ruled that the version of the school district policy permitting students to deliver sectarian and proselytizing prayers violated the Establishment Clause, and the Free Speech Clause's prohibition on viewpoint discrimination did not protect the policy from challenge.[30] The Fifth Circuit stated that the version of the school district policy allowing students to give only nonsectarian, nonproselytizing prayers at graduation ceremonies and over the public address system at football games violated the Establishment Clause. The plaintiffs were entitled to recovery of attorney fees as prevailing parties under section 1988.

Students challenged a volunteer school counseling program involving the use of clergy. The program only involved local clergy and removed students form academic classes to participate. The federal district court entered a verdict in favor of the district. The Fifth Circuit reversed and remanded the case finding it violated the Establishment Clause under the primary effect of advancing religion, by excessively entangling the government, and not being neutral in regard to religion.[31] The appellate court also observed the students had standing even if they had not been selected to participate.

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[29] Altman v. Bedford Cent. Sch. Dist., 45 F. Supp.2d 368 [135 Educ. L. Rep. 410] (S.D.N.Y. 1999).

[30] Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 [132 Educ. L. Rep. 687] (5th Cir. 1999).

In a school district in Louisiana, where the teaching of evolution created a longstanding controversy, the board adopted a resolution disclaiming the endorsement of evolution after it failed in its attempt to introduce creation science into the district curriculum as a legitimate scientific alternative to evolution. The resolution required that a disclaimer statement be read in elementary and high school classes where the scientific theory of evolution was presented. As a result, several parents of children enrolled in the district brought suit in district court challenging the disclaimer under the Establishment Clause in both the state and federal constitutions. The federal district court reasoned that the disclaimer had a religious purpose, specifically to satisfy the religious concerns of the majority that the teaching of evolution in public school contradicted what was taught in Sunday school. In affirming the decision of the lower court, the Fifth Circuit held that the disclaimer did not further the articulated objective of encouraging informed freedom of belief or critical thinking by students; the disclaimer furthered the purposes of disclaiming orthodoxy of belief and of reducing offense to the sensibilities of any student or parent, and those were permissible secular objectives for purposes of the secular purpose prong of the *Lemon* test; the primary effect of the disclaimer was to protect and maintain a particular religious viewpoint, thereby violating the second prong of the *Lemon* test as well as the endorsement test; and award of attorney fees to the plaintiffs was appropriate.[32]

A former student and teacher filed against the board of education and superintendent for beginning the open board meetings with a prayer. This practice began in 1992 with the election of new board members. The federal district court upheld the practice. The Sixth Circuit noted that students were often involved in the meetings and hearings in a variety of settings.[33] The appellate court also noted that the meetings did not qualify under the legislative prayer exception since the board meetings were an integral component of the public school system. The Sixth Circuit reversed and remanded the case stating the practice violated the Establishment Clause.

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[31] Doe ex. rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274 [134 Educ. L. Rep. 52] (5th Cir. 1999).

[32] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 [137 Educ. L. Rep. 195] (5th Cir. 1999).

[33] Coles ex. rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369 [133 Educ. L. Rep. 392] (6th Cir. 1999).

After initially upholding a board policy from a district in Idaho that permitted selected students to give presentations, including prayers, during high school graduation programs, the Ninth Circuit vacated its earlier decision on the basis that the parent lacked standing to challenge the policy since it did not spend any tax dollars on the graduation prayer.[34] The court also found that since the student plaintiff had graduated, the challenge did not present a live controversy; and no exception to mootness doctrine applied.

In Florida, students sued the school board alleging violation of the First Amendment's Establishment Clause concerning the district's policy of permitting graduating students to decide whether to have student representatives give unrestricted messages at the beginning and closing of graduation ceremonies. The federal district court denied the students' motion for preliminary injunction and entered final judgment in favor of the school board. The students appealed. The Eleventh Circuit reversed and remanded the case holding that the school system's policy amounted to a facial violation of the Establishment Clause.[35] The court reasoned that the state cannot erase its control over or endorsement of prayer at a public school graduation through delegation of one portion of the graduation ceremony to the majority/plurality vote of students. Further, a reasonable student will not realize that student-elected sectarian and proselytizing prayerful messages at graduation ceremonies are divorced from state sponsorship and will feel coerced to participate in them. Moreover, the school system developed the policy as a means of circumventing *Lee* and to permit sectarian and proselytizing prayer at graduation ceremonies.

In the Eleventh Circuit, an action was brought against the state and school officials challenging the constitutionality of an Alabama statute permitting nonsectarian, non-proselytizing student-initiated prayer at school-related assemblies, sporting events, graduation ceremonies and other school-related events.[36] The challenge also included the statute as applied by the school board. The federal trial court held that the statute is facially unconstitutional and granted partial summary judgment to the plaintiffs and entered a permanent injunction against the enforcement of the statute. The Eleventh Circuit concluded that the school district's act of permitting genuinely student-initiated religious speech in schools and at school-related events did not violate the Establishment Clause but was required under the Free Speech and Freedom of Expression Clauses and that the students' religious speech could not be supervised by the state but was subject to time, place and manner restriction.

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[34] Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 [135 Educ. L. Rep. 387] (9th Cir. 1999).

[35] Adler v. Duval County Sch. Bd., 174 F.3d 1236 [134 Educ. L. Rep. 790] (11th Cir. 1999).

[36] Chandler v. James, 180 F.3d 1254 [136 Educ. L. Rep. 201] (11th Cir. 1999), *request for en banc rehearing denied*, 198 F.3d 265 (11th Cir. 1999).

First Amendment: Freedom of Speech

The non-custodial father of public school children in Virginia sued the district superintendent for alleged violations of his First and Fourteenth Amendment by depriving him of his rights of free speech and petition by prohibiting him from entering school property. The complaint also charged that the superintendent conspired to violate the father's rights based on his refusing to permit him to enter school property because of his continued pattern of verbal abuse and threatening behavior toward school officials. A federal trial court denied the father's motion for injunctive relief while also declining jurisdiction over the dispute. On further review, the Fourth Circuit affirmed that since the father's federal claims were frivolous, the trial court lacked subject matter jurisdiction.[37] The court reasoned that school officials have the authority to control students and school personnel on school property, as well as the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property. The court found that the officials did not seek to affect the parent's conduct except on school property; thus the parent's constitutional rights were not directly and sharply implicated by the district's prohibition against him.

In Maryland, a high school student sued a board of education and school officials, alleging that their refusal to permit her to wear a headwrap in school to celebrate her cultural heritage violated her First Amendment right to free speech and her Fourteenth Amendment right to be secure in her person. The federal trial ruled in favor of the district in holding that its "no-hats" policy did not violate the student's free speech right or her right to be secure in her person.[38]

A student sued a school district, alleging that the discipline imposed on him following officials' discovery of derogatory materials on his personal Internet homepage violated his First Amendment free speech rights. The student created a homepage on his home computer which was highly critical of the administration at his high school, used vulgar language to convey his opinion regarding the teachers, the principal, and the school's homepage, invited readers to contact the principal to tell him their opinions about the school, and included a hyperlink that allowed readers to access the school's homepage. When the principal learned of the homepage, he suspended the student for ten days. Since suspension days from school are considered unexcused absences, the student ultimately failed all of his classes for the second semester of his junior year when the absentee policy was applied. A federal trial court in Missouri enjoined the district from using the ten-day suspension in its application of its absenteeism policy to the plaintiff's grades; enjoining the district from enforcing any other sanction arising from the plaintiff's homepage; and enjoining the district from restricting the plaintiff's use of his home computer to repost the homepage.[39] The court reasoned that the potential harm to the student if the injunctive relief was not granted was greater than that to the school if it were granted. Further, the court acknowledged that the homepage did not materially and substantially interfere with school discipline and that the public interest would best be served by granting the injunctive relief because the public's interest is best served by wide dissemination of ideas.

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[37] Lovern v. Edwards, 190 F.3d 648 [138 Educ. L. Rep. 118] (4th Cir. 1999).

[38] Isaacs ex rel. Isaacs v. Board of Educ., 40 F. Supp.2d 335 [134 Educ. L. Rep. 166] (D. Md. 1999).

Members of a high school marching band sued their school district seeking to enjoin an alleged violation of their free speech rights when the superintendent prohibited them from performing the song, "White Rabbit," as part of its fall program. The superintendent rejected the use of the song after the band publicly performed it, among others, at a "Parent Review." A parent and school board member contacted the superintendent with concern that the song was included due to its association with drugs. A federal trial court in Missouri granted the board's motion for summary judgment, the federal district court pointed out that the district had the authority and responsibility to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use.[40]

Sexual Abuse and Harassment by Students

A parent, on behalf of a fifth-grade student, sued the school board and officials under title IX for failure to remedy a classmate's sexual harassment of the child. The federal trial court dismissed for failure to state a claim and the parent appealed. The Eleventh Circuit affirmed and certiorari was granted.

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[39] Beussink v. Woodland R-IV Sch. Dist., 30 F.Supp.2d 1175 [131 Educ. L. Rep. 1000] (E.D. Mo. 1998).

[40] McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp.2d 918 [136 Educ. L. Rep. 390] (E.D. Mo. 1999).

The Supreme Court found that a claim was stated in this case and reversed and remanded.[41] The Court determined that a private damages action may lie against a school board under title IX in cases of student-on-student harassment, but only where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit. The Court also asserted that damages for sexual harassment under title IX are limited to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Also, school boards retain flexibility in dealing with harassment and damages are not available for simple acts of teasing and name-calling, even where these comments target differences in gender.

A female student in West Virginia was the victim of several acts of gender-motivated violence at the school. A male student threatened her in a bully-like manner, picked her up and subsequently threw her against a steel pole. A female teacher, who commented but did not intervene, witnessed the incident. As a result of being thrown against the pole, the student suffered a severe cervical spine injury leaving her blind in one eye. The student and her parents brought suit against the school district, principal, vice-principal and the teacher under title IX, section1983 and state law. On the defendants' motion to dismiss, the federal trial court denied in part and granted in part by finding that the student's claim adequately alleged actual knowledge and deliberate indifference to discrimination required under title IX when a teacher witnessed the incident at issue and took no action to intervene; the claim under title IX did not preempt a suit under section1983 if the underlying set of facts not only violates title IX but also violates independent constitutional rights; compulsory attendance laws alone were insufficient to create a special relationship giving rise to affirmative duty to protect; the principal's alleged instruction to the student that she had no right to defend herself against attacks by male students would, if proved, constitute state creation of a dangerous situation; and the allegation of facts sufficient to support the student's federal claims also stated a prima facie case of discrimination in violation of the West Virginia Human Rights Act.[42]

A female high school student and her mother unsuccessfully brought a negligent supervision action against school officals alleging that she was raped by a male student. An appellate court reversed and remanded.[43] In granting the student's petition for a writ of certiorari, the Supreme Court of South Carolina held that evidence of the fourteen year old student's consent to sexual battery was admissible insofar as it pertained to student's claim for damages, but evidence of consent was inadmissible on the issue of liability.

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[41] Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 [134 Educ. L. Rep. 477] (1999).

[42] Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp.2d 618 [130 Educ. L. Rep. 579] (S.D. W. Va. 1998).

[43] Doe ex rel. Roe v. School Dist. No. 2, 518 S.E.2d 259 [137 Educ. L. Rep. 837] (S.C. 1999).

A female student and her parents brought a section 1983 action against a school district, principal, and teacher to recover for a male student's act of touching her leg and the board's failure to allow her father to address the board on the subject. After a trial court in Texas granted the board's motion for summary judgment an appellate court affirmed that the parents and student could not recover from the district without showing an official policy or custom.[44] The court added that father lacked the First Amendment right to address the board on the matter and the district did not violate title IX.

In Tennessee, an elementary school student and her parents sued the metropolitan government and metropolitan board of public education, alleging that the student was subjected to sexual harassment and sexual abuse at the hands of classmates in violation of defendants' obligations under title IX. On the student's and parents' motion to amend the complaint, the board moved to dismiss. The federal district court declared that under Tennessee law, the board of public education was not the entity capable of being sued separately and distinctly from the metropolitan government.[45] The motion to amend was granted in part and the motions to dismiss were granted in part and denied in part. The court added that title IX authorizes a cause of action based on a school's failure to respond appropriately to student-on-student sexual harassment, and the student established a prima facie case of student-on-student hostile environment sexual harassment. Also, the court decided that the student's father had standing to assert claims as student's next friend, but that her parents lacked standing to assert title IX claims in their individual capacities.

A student brought sexual harassment claims against other students, a teacher, school officials, special education district, and member school districts, alleging title IX and constitutional violations. On the defendants' motions for summary judgment, the federal district court held that the special education district was a separate entity from its member school districts, and those districts were subject to title IX liability.[46] Further, the court held that genuine fact of issue precluded summary judgment on title IX claims against school officials and sexual harassment claims against school officials in their individual capacities were not cognizable under title IX. The court maintained that the student was entitled to amend her complaint to include a section 1983 claim, and school officials did not have qualified immunity from claim of sexual harassment by the teacher. The court stated that school officials had qualified immunity, the school superintendent was not liable, the student's allegations that she was sexually harassed by other students did not state a cognizable claim, and the teacher did not have qualified immunity. Finally, the court wrote that the student's allegations were insufficient to establish that the district was liable for equal protection violations, or to state a claim that her rights under free speech and petition clauses of First Amendment were violated.

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[44] Moseley v. Beaumont Indep. Sch. Dist., 997 S.W.2d 934 [137 Educ. L. Rep. 404] (Tex. App. 1999).

[45] Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp.2d 991 [132 Educ. L. Rep. 357] (M.D. Tenn. 1998).

[46] Morlock v. West Cent. Educ. Dist., 46 F. Supp.2d 892 [135 Educ. L. Rep. 493] (D. Minn. 1999).

In Colorado, a student's mother sued a school district and educators over their alleged failure to remedy sexual harassment and assault by a fellow student. After the federal trial court dismissed the action for failure to state a claim, the Tenth Circuit affirmed in part and reversed in part.[47] The court concluded that the mother stated a claim against the school district under title IX for peer sexual harassment as well as against the principal and teachers, who were not entitled to qualified immunity, under section 1983 for violating her right to equal protection rights by allegedly refusing to remedy sexual harassment despite having actual knowledge of it. The court added that the mother failed to allege municipal policy or custom required to maintain an equal protection claim against the district.

The mother of student at the Utah State School for the Deaf and Blind sued the school and its principal under section 1983 and state law following a sexual assault on the student by another student. The federal trial court dismissed the section 1983 cause of action for failure to state a claim and declined to retain supplemental jurisdiction. The Tenth Circuit decreed that the State School is an "arm of the state" for purposes of the Eleventh Amendment and removal of the case to federal court waived the state's Eleventh Amendment immunity.[48] The court also held that the school and its principal, acting in his official capacity, were not "persons" under section 1983, and the mother did not plead sufficient affirmative acts on the part of the principal which would give rise to a claim for deprivation of the student's substantive due process rights. Finally, the court agreed that the mother asserted a viable substantive due process claim against the principal on the theory that he failed to adequately train school employees or adopt or implement a policy to present sexual assaults like those against her son and that the administrator was not entitled to qualified immunity.

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[47] Murrell v. School Dist. No. 1, Denver, Col., 186 F.3d 1238 [137 Educ. L. Rep. 474] (10th Cir. 1999).

[48] Sutton v. Utah State Sch. for Deaf and Blind, 173 F.3d 1226 [134 Educ. L. Rep. 697] (10th Cir. 1999).

The mother of a minor student who attended a high school program at the state military college brought an action individually and on behalf of the student against the school after the student was raped by a fellow student. The court denied the college's motion to dismiss. On further review, an appellate court reversed the decision of the lower court stating that an exception to a waiver of sovereign immunity under the Georgia Tort Claims ACT that was applicable to claims for losses resulting from assault and battery barred recovery by the student against the college.[49] The court also reasoned that the public duty doctrine was inapplicable since this case did not involve police protection.

A student in Florida unsuccessfully sued her board for negligence, alleging that she was sexually assaulted by another pupil on school grounds. An appellate court reversed in indication that the failure of the trial court to *voir dire* jurors regarding potential misconduct warranted a new trial.[50]

Sexual Abuse and Harassment by Employees

A student and her parents sued a school district and school administrators, asserting claims arising from acts of indecent physical and sexual assault committed by a teacher upon the student on school district property and elsewhere. Upon defendants' motion to dismiss section 1983 claims and state law claims, the federal district court granted the motion in part and denied in part.[51] The court held that remedies for sexual harassment under title IX did not foreclose remedies under section 1983, but claims against the school district and administrators for breach of duty to prevent or mitigate the teacher's sexual abuse of the student by failing to investigate or report allegations that he had previously sexually assaulted girls were barred by Massachusetts Torts Claims ACT .

In a second case from Massachusetts, a high school student sued a school district and its supervisory employees seeking compensatory and punitive damages arising from her alleged rape by a coach. Defendants moved for judgment on the pleadings. The federal district court held that the district was not immune from punitive damages under title IX, barring gender discrimination in federally funded programs, and the state Claims Act suit could not be maintained against the school for actions of employees other than the coach.[52] The state Claims Act suit could not be maintained against the district for either intentional or negligent action of the coach, and title IX preempted suit under section 1983, alleging deprivation of student's substantive due process rights.

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[49] Georgia Military College v. Santamorena, 514 S.E.2d 82 [134 Educ. L. Rep. 377] (Ga. App. 1999).

[50] Henderson v. Dade County Sch. Bd., 734 So. 2d 549 [135 Educ. L. Rep. 1143] (Fla. Dist. Ct. App. 1999).

[51] Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp.2d 114 [137 Educ. L. Rep. 611] (D. Mass. 1999).

A student sued the school district, school board, assistant superintendent, and teacher under title IX and section 1983 for alleged sexual harassment by fellow students while plaintiff was in the sixth grade. The federal district court granted the motion of defendants for summary judgment in part, and after a jury entered a verdict in favor of the school on the remaining claims, an appeal was taken. The Second Circuit recognized that the school officials had qualified immunity.[53] The appellate court further reflected that the showing of actual knowledge of sexual harassment by the district was a prerequisite to liability under title IX. The alleged failure of the trial court to provide a jury with a sufficiently inclusive list of individuals did not require reversal of the general verdict in favor of the district. The trial court did not commit a reversible error by failing to charge the jury appropriately, nor did the trial court abuse its discretion by declining to exclude from the courtroom the district administrator and teacher in whose classroom the alleged harassment occurred.

A female high school student, who was sexually harassed by a male student on a school bus, brought negligence action against the high school and its principal and sought to file a late notice of claim under the Tort Claims Act against the township and its board of education. The court denied the motion to file a late notice of claim and granted summary judgment to the high school and principal. The appellate court held that the student failed to establish extraordinary circumstances warranting permission to file late notice of tort claim against the township and board of education but the high school and principal owed a duty of care to the student.[54] The charitable immunity precluded a negligence claim against the high school, but not against the principal. Finally the student's failure to satisfy the notice requirements of the Tort Claims Act did not preclude a third-party complaint against the township and board of education for indemnification.

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[52] Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp.2d 66 [137 Educ. L. Rep. 246] (D. Mass. 1999).

[53] Bruneau ex rel. Schofield v. South Kortright Cent., 163 F.3d 749 [131 Educ. L. Rep. 593] (2nd Cir. 1998).

[54] S.P. v. Collier High Sch., 725 A.2d 1142 [133 Educ. L. Rep. 183] (N.J. Super. Ct. App. Div. 1999).

A high school student brought section 1983 action against a male coach for the high school women's track team and school board after it was discovered that the coach had secretly video-taped students in various stages of undress while they were in the women's locker room. The court entered judgment on the jury verdict for the student, and the school board appealed. The appellate court reversed and entered final judgment holding that the school board's conduct in retaining the coach following an earlier investigation was insufficient to establish the necessary violation of a duty to the plaintiff by establishing a causal connection between the board's conduct and the subsequent deprivation of the plaintiff's federal rights.[55]

Parents of a kindergarten student sued the teacher, school principal, school board, and parents of two other students, alleging sexual abuse, harassment, and battery by the child's classmates and lack of proper response by school officials in violation of section 1983 and state law. The complaint was amended to include cause of action under title IX. The federal district court concluded that meetings between school administrators and parents were insufficient to create or enhance danger posed by abusive students, and school officials could not be deemed actual perpetrators of the constitutional violation. The court granted the motion to dismiss.[56]

Parents on behalf of their minor daughter sued a teacher and others for separating the family for a period of three years during an investigation of possible child abuse, alleging deprivations of procedural and substantive due process rights, sexual harassment under title IX, violations under section 1983, violations of the Individuals with Disabilities Education Act (IDEA), and negligence and intentional torts under state law. The action arose when the parents enrolled their four-year-old daughter in an elementary school so that the child could obtain speech therapy. Without the parents' permission or knowledge, the child's teacher had the child use a process called facilitated communication (FC). The machine was not to be used with students so young, but the teacher guided the student's hand in typing a printout containing allegations of sexual abuse against her parents which included a number of sexually explicit and graphically violent phrases. The teacher reported the alleged sexual abuse of the child to the Texas Department of Protective & Regulatory Services (TDPRS), but did not contact the parents. Following its investigation, TDPRS removed the child from her parents' custody and initiated a suit to permanently terminate their parental rights, although examinations by two physicians revealed no evidence of sexual abuse. Despite mandates to discontinue use of the FC sessions with the child, the teacher continued, during which graphic themes of sexual conduct and violence were explored. Others attempted to conduct FC with the child, but did not obtain any results. The district superintendent chose to take no action. The parents lost custody of their daughter for almost three years, the father was not allowed to have contact with his daughter, he lost his job as a result of the allegations, and both parents alleged that the charges of abuse destroyed their marriage. The teacher moved for summary judgment and dismissal of the suit for failure to state a claim upon which relief can be granted. In her motion, she asserted qualified and statutory immunity and challenged the evidentiary and legal bases of claims made by the plaintiffs under title IX and the IDEA. The Fifth Circuit recognized that the constitutional protection of bodily integrity and freedom from sexual harassment do not prohibit a teacher from holding a preschool child in her lap, guiding her arm, or typing words that the child does not understand.[57] The court contended the teacher's fabrication of sexual abuse against the student's father violated substantive due process and the constitutional right to family integrity; and the teacher's alleged fabrication of the child abuse charge was not objectively reasonable, and thus she was not entitled to qualified immunity. The court also held that there was an issue of fact as to causation, precluding summary judgment on the section1983 claim since the parents did not state a cause of action under the IDEA; and there were genuine issues of material fact, precluding summary judgment on the teacher's claim of statutory immunity from liability under Texas law on state negligence and intentional tort claims. The case was affirmed in part, reversed in part, and remanded.

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[55] School Bd. of Portsmouth v. Colander, 519 S.E.2d 374 [138 Educ. L. Rep. 374] (Va. 1999).

[56] Doe v. Sabine Parish Sch. Bd., 24 F. Supp.2d 655 [130 Educ. L. Rep. 1228] (W.D. La. 1998).

High school students sued the school district, district administrators, and teacher, alleging that a teacher's sexual relationship with them resulted in numerous federal constitutional and state statutory and common law violations. The federal district court observed that questions of material fact precluded summary judgment on issues of supervisory liability and qualified immunity.[58] The court conceded that a question of material fact precluded summary judgment on the issue of the district's liability for the decision to rehire this teacher. The court held that the district and its employees were immune, under Illinois law, from liability for alleged negligent supervision of the teacher and for failure to report the abuse. Finally, the court pointed out that a state statutory duty to report abuse required a degree of judgment and discretion removing it from realm of "ministerial acts." The court denied the plaintiffs' motion and granted the defendants' motions in part and denied in part.

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[57] Morris v. Dearborne, 181 F.3d 657 [136 Educ. L. Rep. 693] (5th Cir. 1999).

[58] Doe v. Board of Educ. of Consol. Sch. Dist. 230, 18 F. Supp.2d 954 [130 Educ. L. Rep.184] (N.D. Ill. 1998).

A mother of a thirteen-year-old student brought action against a public school librarian, school district, and district's employment liability insurer, alleging the librarian had sexual contact with the student. The court granted the insurer's motion for summary judgment, and the librarian appealed. The appellate court reasoned that the librarian's sexual assaults were so certain to result in injury that his intent to injure would be inferred as a matter of law for purposes of application of the intentional acts exclusion.[59] The intentional acts exclusion precluded coverage on the district's cross claim.

A student brought section 1983 action and title IX hostile environment sexual harassment claims against a school district, several school officials, and a high school teacher with whom the student had a homosexual relationship. The federal district court granted summary judgment in favor of defendants, and the student appealed. The Eighth Circuit affirmed in part, reversed in part, and remanded. On remand, the district court dismissed title IX claims against the school superintendent and principal in their individual capacities, and the jury returned a verdict against them in their official capacity. The district court denied the student's motion for default judgment against the teacher sued in her individual capacity. An appeal was taken. The Eighth Circuit held that the student failed to make a necessary showing that the school district acted with deliberate indifference after being placed on notice of sexual harassment by the teacher as required for claim against the school under title IX.[60] Also, the teacher could not be sued in her individual capacity under title IX, but the student could bring individual capacity suit against the teacher under section 1983, alleging violation of student's Fourteenth Amendment rights.

A former student sued a school district under title IX and Violence Against Women Act (VAWA), alleging that she was sexually abused by a teacher approximately 30 years earlier. The district court dismissed the claim. The Eighth Circuit affirmed declaring that neither the VAWA nor title IX applied retroactively to allow the former student's claim against the school district, and the former student could not avoid presumption against retroactive application of statutes based on her contention that she did not realize existence of a cause of action until over 20 years after title IX's enactment.[61]

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[59] C.L. v. School Dist. Of Menomonee Falls, 585 N.W.2d 826 [130 Educ. L. Rep. 290] (Wis. Ct. App. 1998).

[60] Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607 [133 Educ. L. Rep. 418] (8th Cir. 1999).

[61] Gross v. Weber, 186 F.3d 1089 [137 Educ. L. Rep. 470] (8th Cir. 1999).

A former student brought action against a school district and former district employee, seeking damages for sexual abuse allegedly perpetrated on him by the employee. The court granted the school district's motion for a directed verdict, and the student appealed. The appellate court declared that the school district could not be held vicariously liable for abuse under a doctrine of respondeat superior, nor was the district negligent in failing to prevent the abuse. Also, the district was not liable under the negligent hiring theory or under negligent retention and supervision theory.[62]

A former student brought action against a public school district alleging negligence, violation of the Human Rights Act, and vicarious liability for conduct of a former teacher with whom the student had a sexual relationship. The court granted summary judgment to the school district on the basis of discretionary immunity. The appellate court decided that the school district's decisions as to method, manner, and extent of investigation of an anonymous tip alleging inappropriate teacher-student contact were policy decisions entitled to discretionary immunity from tort claims.[63]

A school bus driver sued parents of student passengers, seeking damages for defamation, intentional interference with economic relations, and intentional infliction of emotional distress, arising out of the parents' allegations before the school board that the driver had sexually molested students. The court found for plaintiff, awarding damages, and the parents appealed. The appellate court determined that the evidence was sufficient to establish that the parents published false defamatory statements to interfere with the driver's employment relationship, and the executive sessions hearing held by the school board did not give rise to absolute privilege for the parents' statements at the hearing. The appellate court also held that the allegations amounted to conduct beyond all bounds of socially tolerable behavior, and evidence was sufficient to warrant a finding that the driver's emotional distress was severe.[64] Also, the erroneous denial of the parents' motion for a directed verdict on the defamation claim did not require remand, and the punitive damages award was not constitutionally excessive.

A former student brought action against a school teacher and school district alleging assault, battery, false imprisonment, seduction, and sexual abuse. Following removal, the court entered summary judgment on behalf of the teacher and school district, and dismissed all claims governed by the one year statue of limitations. The appellate court certified the question of whether the sexual abuse claim was barred by a four-year statute of limitations.[65] The court decreed that the four-year statute of limitations was not tolled by the exceptional circumstances version of the discovery rule involving repressed memory of the former student. The court remanded the case.

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[62] Godar v. Edwards, 588 N.W.2d 701 [132 Educ. L. Rep. 173] (Iowa 1999).

[63] Doe v. Park Center High Sch., 592 N.W.2d 131 [134 Educ. L. Rep. 307] (Minn. Ct. App. 1999).

[64] Kraemer v. Harding, 976 P.2d 1160 [134 Educ. L. Rep. 619] (Or. Ct. App. 1999).

A student who had been sexually molested by a teacher sued the school district under title IX and section 1983. A jury in the federal district court returned a verdict for the district, and the student appealed. The Eleventh Circuit held that the district court did not abuse its discretion by refusing to compel production of student directory records.[66] The proffered testimony of students and parents who had publicly supported the teacher after he resigned was irrelevant, and the proffered testimony of a former student stating that the teacher had molested him, and he had repeatedly told the principal about the abuse was properly excluded on the ground that the witness was not listed on the pretrial order.

The Supreme Court vacated this judgment concerning the rape of a student by a school security guard and instructed the Eleventh Circuit to reconsider the case in the light of its decision in *Gebser v. Lago Vista Indep. Sch. Dist.* The Eleventh Circuit reconsidered and stated that their initial decision was consistent with the Supreme Court's decision and reasoning in *Gebser*.[67] Judgment of the district court was again affirmed.[68]

A student brought action against a school board, alleging he was subjected to same-sex sexual harassment by a teacher in violation of title IX, barring educational institutions that receive federal assistance from discriminating on the basis of sex. The Circuit Court, Jefferson County, entered summary judgment in favor of the board, and the student appealed. The state appellate court held that sexual harassment of the student by a teacher of the same sex could support a claim under title IX, but that the school board was not liable under title IX.[69]

Sexual Abuse by Other Parties

A student sued a city board of education for failure to supervise and sought damages for sexual molestation by a volunteer art teacher. The board moved to dismiss, or in alternative for summary judgment. The court denied this motion, and the board appealed. The appellate court was of the view that the school principal's failure to perform a background check on the volunteer could not serve as basis for cause of action for negligent hiring, and the school's grant of permission to the volunteer to work with students was not a proximate cause of the student's injury. The appellate court reversed the decision and granted the motion to dismiss.[70]

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[65] Burkholz v. Joyce, 972 P.2d 1235 [132 Educ. L. Rep. 1005] (Utah 1998).

[66] R.M.R. by P.A.L. v, Muscogee County Sch. Dist., 165 F.3d 812 [131 Educ. L. Rep. 943] (11th Cir. 1999).

[67] 524 U.S. 274 (1998).

[68] Floyd v. Waiters, 171 F.3d 1264 [133 Educ. L. Rep. 717] (11th Cir. 1999).

[69] H.M. v. Jefferson County Bd. of Educ., 719 So. 2d 793 [130 Educ. L. Rep. 952] (Ala. 1998).

Parents brought a personal injury action against a school district on behalf of their daughter who was sexually assaulted by an intruder in a school locker room, to which she had returned after completing a swimming test. In their suit, they alleged that the school district failed to provide adequate supervision, protection and security, and failed to enact or enforce appropriate security policies. Prior to the assault, school officials noticed the assailant on the school premises but failed to question him regarding his presence on school grounds. The Minnesota Court of Appeals ruled that school employees who noticed the intruder prior to the incident were entitled to official immunity, and the school district was not entitled to vicarious immunity.[71]

Privacy

A student suing a teacher for sexual harassment moved for adoption of a confidentiality order. The district court held that the proposed order was unduly restrictive.[72] The court stated that the order was unwarranted absent showing that disclosure of allegedly intimate information would have any undue detrimental effect on the student. The court denied this motion.

Parents of a victim allegedly sexually assaulted by another student in the school restroom brought action against the school district. The court denied the parents' motion to compel disclosure by the school of certain requested items of information, and the parents appealed. The appellate court determined that information sought by the parents did not fall within the purview of the Buckley Amendment.[73] The court did state that the parents were entitled to disclosure of names and addresses of witnesses to the assault, statements taken from the victim by school officials, written reports of the assault prepared by school officials, and records or reports of any incidents of violent behavior occurring at the school in the year prior to the assault. The parents were not entitled to disclosure of school records of the victim's fellow student.

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[70] Koran I. v. New York City of Bd. of Educ., 683 N.Y.S. 2d 228 [132 Educ. L. Rep. 170] (N.Y. App. Div. 1998).

[71] S.W. v. Spring Lake Park Dist. No. 16, 592 N.W.2d 870 [134 Educ. L. Rep. 566] (Minn. Ct. App. 1999).

[72] Doe v. Lepley, 185 F.R.D. 605 [135 Educ. L. Rep. 543] (D. Nev. 1999).

[73] Culbert v. City of New York, 679 N.Y.S.2d 148 [130 Educ. L. Rep. 239] (N.Y. App. Div. 1998).

A student, who was allegedly sexually assaulted in a school dormitory by a second student, brought negligent supervision action against a school. The court denied the student's motion to compel the school to comply with notice of discovery and inspection and granted the school's motion for a protective order with respect to notice of discovery and inspection. The student appealed. The appellate court conceded that prior written or oral complaints involving a second student relating to his behavior toward fellow students and the records regarding prior incidents involving the second student wherein he exhibited violent and/or sexual overtures toward fellow students were relevant, material and discoverable.[74]

A student was injured when he was assaulted by a second student and sued the second student and the school district alleging that the district had failed to adequately supervise the second student. The court denied plaintiff's motion to compel the unsealing and disclosure of the school disciplinary records for the second student. The plaintiff appealed, and the appellate court held that the plaintiff was entitled to discovery of school disciplinary records pertaining to a prior incident involving the second student.[75]

A judge directed the proceedings for a suspension case be sealed at the conclusion of the proceedings. The plaintiffs had requested the proceedings be closed, and the defendants did not object. A local newspaper sought access to the records and sought a writ of prohibition. The appellate court ruled that the public can attend civil court proceedings and that actions involving juveniles are open to public access.[76] Still, the court asserted that the state had a compelling policy of protecting the confidentiality of juvenile information during court proceedings. The court denied the petition stating that the circuit court did not exceed its legitimate powers and could close the proceedings and seal the record.

A high school student and his parents requested damages relating to the disclosure of information from the student's educational record to colleges and universities. At the heart of this matter was a letter from the parents requesting certain information not be disclosed and a discussion of factors surrounding the incident. The letter was then sent by the school with the student's transcript to these universities. The parent's claimed a violation of privacy rights under both state and federal law. The Boone

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[74] Egle v. Maplebrook Sch., 679 N.Y.S.2d 85 [130 Educ. L. Rep.236] (N.Y. App. Div. 1998).

[75] Graham v. W. Babylon Union Free Sch., 692 N.Y.S.2d 460 [136 Educ. L. Rep. 1012] (N.Y. App. Div. 1999).

[76] State v. Hoke, 520 S.E.2d 186 [138 Educ. L. Rep. 945] (W. Va. 1999).

Superior Court dismissed the claims, and the student appealed. The Court of Appeals of Indiana found no violation of FERPA or of any federal or state rights.[77] The court also stated that since there was no inappropriate disclosure of information, the district could not be enjoined from continuing disclosures.

The American Civil Liberties Union requested records concerning a district's discipline policy and notices sent concerning suspension of high school students participating in a protest walkout. The district stated the records were available for review in the administrative offices and refused to mail the documents. The ACLU sued the district under Washington's public records act. The court granted the district's motion for summary judgment. The appellate court reversed and remanded the case, and the court awarded damages and lawyer's fees.[78] Upon appeal, the court ordered that the district did not act in good faith, the ACLU could recover all reasonable costs, and an arbitrary limitation of attorney fees was improper.

The mother of a 12-year-old middle school student sued the school district for damages for not allowing the student to use her nickname while at school. The parent alleged negligence, invasion of privacy, and intentional infliction of emotional distress and requested damages for the emotional distress that the student suffered as a result of her teachers' refusal to permit her or her classmates to use her nickname in school because it is a synonym for "marijuana." The plaintiff contends that, by telling other students that the student's nickname was a synonym for marijuana, the teachers publicly suggested that the student used, or condoned the use of illicit drugs. The Oregon Court of Appeals found that the teachers merely asked that the student use her given name in class and concluded that the trial court did not err in entering summary judgment in favor of the defendant on the plaintiff's claim for intentional infliction of emotional distress.[79] The court held that the student did not have a legally protected interest in using her nickname at school.

Search and Seizure

A principal searched several high school students' rooms during a school sponsored trip and discovered alcohol and marijuana in one room. The students had been notified prior to the trip that rooms would be checked. The principal had smelled marijuana earlier in the day and had worked with hotel security to search the rooms. The two students were sent home early and were then suspended for three days of school. The students sought section 1983 action based on an illegal search. The federal district court granted the defendant's motion for summary judgment.[80] The court agreed that the search was not intrusive and that individualized suspicion was not required in this case. The court stated that the principal was protected by qualified immunity.

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[77] Meury v. Eagle-Union Community Sch., 714 N.E.2d 233 [136 Educ. L. Rep. 1028] (Ind. Ct. App. 1999).

[78] ACLU v. Blaine Sch. Dist. No. 503, 975 P.2d 536 [133 Educ. L. Rep. 1062] (Wash. Ct. App. 1999).

[79] Phillips v. Lincoln County Sch. Dist., 984 P.2d 949 [137 Educ. L. Rep. 1127] (Or. Ct. App. 1999).

A student was adjudicated delinquent for carrying a gun to school. The student appealed the decision stating the search was illegal. The appellate court ruled the administrator was not an agent of the police and only needed reasonable suspicion.[81] The court found basis for reasonable suspicion and affirmed the decision.

Parents sought judgment under section 1983 for violation of Fourth, Ninth, and Fourteenth Amendment rights in an intrusive search involving testing of body fluids for drug use. A teacher suspected a student had taken drugs and reported it to the school principal. The parent was called and was told that his daughter would have to have a drug test before returning to school. The test was negative. Other students overheard the school nurse talking to the lab concerning the results. The parents commenced action claiming the lack of reasonable suspicion to initiate the search and a violation in privacy rights in the inadvertent release of information concerning the test. The federal district court concluded all defendants were statutorily immune and granted summary judgment.[82]

The Supreme Court of Pennsylvania upheld a school-wide search for weapons conducted as a pre-condition to entry for all students.[83] A high school student was arrested for carrying a Swiss army knife, and the court denied the juvenile's motion to suppress the evidence even when the search was conducted without individualized suspicion. The court stated that general searches are allowed depending on the nature of the privacy interest, the level of intrusion, the immediacy of the governmental concern, and the efficacy of the means utilized. The school district provided notice for the reason and manner of the search. They used search of pockets and backpacks and used a hand-held metal scanner. This type of search does not require physical intrusion during the search. Finally, the interest of keeping weapons out of the school provided a compelling concern for the protection of students.

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[80] Rhodes v. Guarricino, 54 F. Supp.2d 186 [137 Educ. L. Rep. 258] (S.D.N.Y. 1999).

[81] In Re Hector R., 695 N.Y.S.2d 359 [138 Educ. L. Rep. 469] (N.Y. App. Div. 1999).

[82] Hedges v. Musco, 33 F. Supp.2d 369 [132 Educ. L. Rep. 404] (D.N.J. 1999).

[83] In re F.B., 726 A.2d 361 [133 Educ. L. Rep. 528] (Pa. 1999).

A middle school student was caught carrying a gun on school grounds and was charged for possession of a weapon and removal of identification marks. The student filed a motion to suppress the gun as physical evidence, and the court granted the motion. The appellate court reversed and remanded the case stating that the school officials were not acting as agents of the police and did not require reasonable suspicion supported by specific and articulable facts before questioning the student concerning the anonymous rumor.[84] The student was not entitled to Miranda warnings concerning a "conduct that violates both the law and school rules."

A student tried to suppress the use of evidence in court action. Marijuana had been obtained from the student following questioning by the dean of students. The court had denied the student's motion, and the student appealed. The appellate court determined that the questioning within the school did not require a Miranda type warning.[85] The student was not in a custodial interrogation situation requiring his parents to be present. Finally, the student handed the vial to the dean upon request, and this would not constitute a search. The appellate court affirmed the decision.

Eighth-grade students sought declaration that strip searches were unconstitutional and sought emotional distress and battery claims. The federal district court denied the school district, administrator, and teacher requests for summary judgment and stated that the defendants were not entitled to qualified immunity. The search resulted from a fellow student's assertion that $200 had been stolen. The court recognized that the search was excessively intrusive for the circumstances without information that a specific student had stolen the money.[86] The strip search include both bra and underwear. The court stated that the search was not justified at its inception nor was it reasonably related in scope to the circumstances involved.

The Eighth Circuit affirmed the use of random drug testing of students.[87] The district began the program in which both a parent and the student must sign consent forms before the student can be tested. Failure to sign the forms prevented the student from participating in extracurricular activities. In this case, the student consented, but the parents refused consent and brought the current suit. The district did not have evidence of drug use in the district. The district court stated that particularized suspicion was not required, students' expectation of privacy is lower than the general population, intrusion was minimal, and the district's interest in preventing drug and alcohol use outweighed privacy concerns. The Fifth Circuit ascertained that students wishing to participate in student activities have a lower expectation of privacy than non-participating students.

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[84] In re D.E.M., 727 A.2d 570 [133 Educ. L. Rep. 990] (Pa. Super. Ct. 1999).

[85] G.J. v. State, 716 N.E.2d 475 [138 Educ. L. Rep. 488] (Ind. Ct. App. 1999).

[86] Konop v. Northwestern Sch. Dist., 26 F. Supp.2d 1189 [131 Educ. L. Rep. 201] (D.S.D. 1998).

[87] Miller ex. rel. Miller v. Wilkes, 172 F.3d 574 [133 Educ. L. Rep. 765] (8th Cir. 1999).

A former high school student claimed the use of drug sniffing dogs to sniff students was a violation of Fourth Amendment rights to be free from unreasonable searches and seizures. The sheriff's department brought a dog to the school to search for drugs. Students were told to leave the room so the dog could sniff for drugs. The dog was stationed at the door to the room and sniffed students as they left. The dog alerted on one student but not on the plaintiff. No drugs were found at the high school during the search. The student sought damages and injunctive relief. The injunction was dismissed as moot since the boy was no longer a student in the school district and thus did not have standing to seek relief. Damages against the superintendent were barred by the Eleventh Amendment, and other administrators had qualified immunity since the rules were not clearly established of whether sniffing by a dog constituted a search. The Fifth Circuit and Seventh Circuit had reached different decisions regarding this issue. The Ninth Circuit ruled that the search was not constitutional since there was not individualized suspicion, the students had a strong interest in privacy, and the state did not have a compelling interest since there was not an immediate drug crisis at the school.[88] The court also determined that the student had not been subjected to an unreasonable seizure. Detaining the students outside for fifteen minutes while the dog searched the room was permissible within the school context. The officials did not take any belongings from the room or the student and thus no seizure of property resulted. Finally, the court determined that the sheriff's office had a policy to only search possessions and not people and the officers were trained in this procedure, so there was not a cause for section 1983 action.

Instructional Issues

A high school student, by her parents, sued a school district and a teacher alleging intentional infliction of emotional distress based upon the teacher's use of a racial epithet in his English classroom, which required that the student respond to its use. The school district and the teacher moved for dismissal of the case for failure to state a cause of action, and the plaintiffs appealed. The appellate court affirmed the decision and held that the teacher's conduct was insufficiently egregious conduct as a matter of law to support the plaintiffs' claim of emotional distress.[89] A dissenting judge concluded that the teacher's use of the racial epithet was not only poor judgment, but that his disregard and invasion of the student's feelings and emotions was at the very least reckless. The behavior was further exacerbated since the remarks targeted the only African-American female in the class and were used in such a way as to solicit a response from the student. In addition, the fact that the remarks were used during a classroom discussion about prejudice would render them no less objectionable, particularly for an adolescent.

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[88] B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 [138 Educ. L. Rep. 1003] (9th Cir. 1999).

A class of persons under the age of 21 confined in county correctional institutions brought an action against the Pennsylvania Department of Education, Department of Education Secretary, and the school districts in which Delaware County Prison, Philadelphia House of Corrections, and York County Prison were located. The suit alleged violations of their rights to basic and special education as guaranteed them by the Equal Protection Clause of the Fourteenth Amendment, federal statutes and state law. It specifically challenged the constitutionality of a Pennsylvania statute limiting the schooling provided school-aged incarcerated persons in county correctional facilities to the quantum of education provided throughout the Commonwealth to expelled students. Upon the plaintiff's motion for preliminary injunction, the federal district court noted that the plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claim that the statute was not rationally related to a legitimate government interest.[90] The court acknowledged that withholding education from any category of inmates of school age in accordance with the statute was a policy freighted with gravely detrimental social consequences.

In Illinois, two high school students brought a civil rights action against the school district under section 1983 and section 1988. Students played two unauthorized guitar pieces during a school band program in direct defiance of the school rules which prohibited band members from departing from the planned music. As a result, they received an "F" in the course, which prevented one of the appellants from graduating with honors. In their suit, the students charged that the school district violated their right to substantive due process in the imposition of disciplinary measures unrelated to academic conduct and outside the parameters and intent of the

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[89] Graham v. Guilderland Cent. Sch. Dist., 681 N.Y.S.2d 831 [131 Educ. L. Rep. 820] (N.Y. App. Div. 1998).

[90] Brian B. v. Pennsylvania Dept. of Educ., 51 F. Supp.2d 611 [136 Educ. L. Rep. 792] (E.D. Pa. 1999).

Illinois School Code and school district disciplinary policy. The Seventh Circuit disagreed and, in affirming the lower court ruling, found that the students failed to state their claim.[91]

In Minnesota, a student's parents sought a writ of certiorari from the decision of the school board to award the student a grade of zero for a history project in which he copied text verbatim from a reference book. At the beginning of the semester, the teacher for the course distributed behavior guidelines to the students, which stated that a violation could result in "[n]ullification of any/all points for [the] assignment in question." The student plaintiff received and signed a copy of these guidelines, and he also received a student handbook at the beginning of the year that defined plagiarism and provided that for a first offense of plagiarism a student would receive a grade of zero. The student received substantial due process at several levels. The Minnesota Court of Appeals affirmed the decision of the lower court by ruling that the student handbook did not constitute a unilateral contract between the student and the school district; the student's protected liberty or property interests were not impaired by the charge of plagiarism; and the student received appropriate due process.[92] The court reasoned that since the relationship between a student and a teacher is one of mutual trust and confidence, the student has an obligation to respond positively to reasonable rules and regulations implemented by the teacher in conducting the class. Further, the teacher treated the student fairly; and since the student violated the rule, he must suffer the consequences.

School districts filed a petition for writ of mandamus and complaint for declaratory and injunctive relief, seeking recognition of their authority to request general waivers of statutory English-only requirements as applied to limited English proficiency (LEP) students. The court granted the writ, and the State Board of Education appealed. The appellate court reversed the writ and remanded the case with directions.[93] It offered that conflict between the statutory English-only requirement and provision by the Education Code permitting school districts to apply for waivers of any provision of Education Code not specifically enumerated was irremediable. The failure of the voter initiative to amend the waiver authorization provision to specifically enumerate the English-only requirement was an oversight by the initiative's drafters. The English-only provision was more specific than the waiver authorization provision and for that reason controlled.

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[91] Dunn v. Fairfield Community High Sch. Dist. No. 225, 158 F.3d 962 [130 Educ. L. Rep. 105] (7th Cir. 1998).

[92] Zellman v. Independent Sch. Dist. No. 2758, 594 N.W.2d 216 [134 Educ. L. Rep. 1017] (Minn. Ct. App. 1999).

[93] McLaughlin v. State Bd. of Educ., 89 Cal.Rptr.2d 295 [137 Educ. L. Rep. 1070] (Cal. Ct. App. 1999).

In Alabama, parents brought an action against the board of education alleging that the board required them to purchase textbooks for classes required for high school graduation in contravention of state statute. The plaintiffs argued that the statute provided that any deficiency in the availability of school textbooks would be remedied and that all school textbooks would be supplied for all grades. Although the board admitted that it violated the state statute the previous year by failing to provide students with certain science textbooks, it denied that it had violated the statute now repealed and moved for summary judgment. Evidence showed that for the years at issue, the school district exhausted all available funds for the purchase of school textbooks after it had purchased textbooks for grades one through eight and that there were no remaining funds available to purchase textbooks for grades 9 through 12. The plaintiffs presented no evidence to contradict the school district's evidence or to show that the district's purchase of textbooks was not in compliance with the statute. The Civil Court of Alabama ruled that the board did not violate the statute, providing that textbooks shall not be purchased for any grade unless textbooks in each subject have been provided for every pupil in the next lower grade, when it failed to purchase textbooks for grades nine through twelve.[94]

Miscellaneous

Parents of a student in Maine who unsuccessfully attempted suicide sued their board of education, a gym teacher, and others under section 1983 and state law on behalf of themselves and their daughter. Where the fourteen year old eighth grade student was reprimanded by her gym teacher for misconduct and sent to a locker room without supervision, she tried to hang herself. The student survived but spent several weeks in a coma and was left with permanent impairments. The student's complaint described two incidents as background. First, she claimed that school officials knew that the student had been raped when she was thirteen. Second, she charged that seven other school mates attempted suicide in the previous three months. The complaint alleged that administrators failed to take measures to cope with the epidemic such as offering counseling and monitoring programs. The First Circuit affirmed that a school's failure to protect a student generally is not a substantive due process violation and that the failure of officials to prevent the attempted suicide, after attempts by seven other students, did not violate substantive due process.[95] Finally, the court was convinced that the gym teacher did not violate substantive due process when he reprimanded the student and sent her to the locker room.

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[94] Edmonds v. Bessemer Bd. of Educ., 736 So .2d 646 [136 Educ. L. Rep. 1112] (Ala. Civ. App. 1999).

[95] Hasenfus v. Lajeunesse, 175 F.3d 68 [134 Educ. L. Rep. 826] (1st Cir. 1999).

Two students were stopped for truancy by Philadelphia police officers and returned to the high school. After entering the school building, the officers ordered one of the students into an empty room, but the student verbally challenged the officer and did not readily comply. In response, one of the officers lifted him off the ground by his clothing and threw him across the tiled, cement floor severely injuring the face and jaw of the student. After some time, one of the officers took the student to the school nurse, who failed to assist the student or seek other medical attention for him. The student was taken to the principal's office, and his mother was contacted. Eventually, the student underwent extensive treatment for his injuries. The student sued the school district, school principal and the school nurse under section 1983 alleging failure to assist the student after he was injured by the police officer on school grounds. The district moved for summary judgment. The federal district court granted summary judgment in favor of the defendants finding that the district was not liable, the principal could not be held liable due to absence, the principal was not engaged in a conspiracy with the police and the nurse was not liable based on deliberate indifference.[96]

In Philadelphia, a student and her parents filed a complaint alleging claims under sections 1981, 1983, and 1988, arising from an assault on the student by a group of students at the middle school. The complaint claimed that school officials knew or should have known that the student plaintiff was having difficulties at school as a result of her Native American heritage, which included attacks and threats from other students. They also claimed that they regularly voiced their concerns to the defendants regarding the daily taunts and attacks, and that an agreement had been made with district officials whereby they would ensure the student's safety during, coming to, and leaving school. School officials contended that she should not have been on the third floor, but was to have gone to the cafeteria for lunch on the first floor at that time. However, the plaintiffs argue that she was legitimately on the third floor. On the school district's motion for summary judgment, the federal district court declared that the agreement between the student's family and school officials, intended to ensure the student's safety, did not give rise to a special relationship; the agreement did not give rise to a state-created danger; the assault could not, as a matter of law, serve as a basis for section 1983 action on the theory of policy, practice or custom maintained in deliberate indifference to action taken by subordinates; and the unsupported allegation that the district and the city failed to properly train their employees was insufficient to support the failure to train claim under section1983. The court also stated that an assertion of trouble in the student's neighborhood based upon her Native American heritage was insufficient to support the claim under section1981 and the district, city, and all individual employees were statutorily immune from liability for intentional infliction of emotional distress under Pennsylvania law.[97]

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[96] Woodson v. City of Philadelphia, 54 F. Supp.2d 445 [137 Educ. L. Rep. 268] (E.D. Pa. 1999).

A juvenile was adjudicated wayward by the Family Court based upon an assault and battery of a fellow student, and the juvenile appealed. The court affirmed the decision holding that the juvenile was not entitled to *Miranda* warnings prior to questioning by the principal. The principal was not acting as agent for the police.[98] The testimony regarding the assault was credible.

In Kentucky, two female high school seniors brought title IX pregnancy discrimination action against school administration officials, moving for preliminary injunction enjoining officials to admit them into a student organization. When the two students were juniors, the selection committee voted to offer membership to all juniors with a 3.5 or higher grade point average except the plaintiffs, whose grade point averages were substantially above 3.5. There was strong evidence that consideration was given to the fact that each plaintiff had engaged in premarital sexual activity and had given birth to a child out of wedlock. There was also evidence that other students who were offered admission were not asked whether or not they had engaged in premarital activity, although the committee would have considered the information had it been brought to its attention. The federal district court granted the motion reasoning that the students showed strong likelihood of success on merits based on disparate impact and disparate treatment theories and, the students showed that they would suffer irreparable injury if the preliminary injunction was not granted.[99]

In Nebraska, a student brought a personal injury action claiming that a grade school and high school were negligent in failing to provide his parents written notification of the condition and advise them of the need for professional attention for an abnormal curvature of the spine that was revealed during periodic examinations conducted by licensed nurses who were employed by a contractor that provided health services to schools.

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[97] Page v. School Dist. of Philadelphia, 45 F. Supp.2d 457 [135 Educ. L. Rep. 120] (E.D. Pa. 1999).

[98] In re Harold S., 731 A.2d 265 [135 Educ. L. Rep. 554] (R.I. 1999)

[99] Chipman v. Grant County Sch. Dist., 30 F. Supp.2d 975 [131 Educ. L. Rep. 994] (E.D. Ky. 1998).

The student claimed that he suffered serious and permanent bodily injuries for which he was entitled damages. In the original action, the district court granted summary judgment in favor of the school, and the student appealed. The Nebraska Supreme Court decided that, as a matter of law, the schools did not have a duty to supervise nurses or to take any affirmative steps to ensure that the nurses were carrying out their professional responsibilities to inform student's parents of an abnormal spinal condition revealed during periodic screenings.[100]

An African-American high school student brought an action against a school district and school officials arising in part out of an incident of racial harassment in which several classmates placed on her desk a drawing of an African-American person hanging from a tree by a rope around his or her neck. The student plaintiff alleged that the word that was written next to the hanging body was a racial epithet. The student complained to her teacher, who took no action other than allowing her to leave the classroom. Both parents spoke separately with school officials with no results. The plaintiff also alleged that her locker was broken into and that the defendants had long created, encouraged, accepted and tolerated the racially hostile environment at the school. In her suit, the plaintiff asserted five claims: unlawful racial discrimination in violation of title VI; violation of section 1983; violation of the California Unruh Act; intentional infliction of emotional distress; and negligent infliction of emotional distress. The defendants moved to dismiss, and the federal district court granted in part and denied in part. It held that the student stated the title VI claim against the school district and stated a claim against the school district and school officials under California's Unruh Act. The court asserted that the school district, school officials, and teacher were entitled to immunity under California Government Code on the student's claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.[101]

In Utah, the federal district court denied a motion for preliminary injunction requested in an action by a support organization for homosexual high school students. It alleged that the school's denial of an opportunity to meet on school premises during noninstructional time violated "limited open forum" protections afforded noncurriculum-related student organizations by the Equal Access Act. The court reasoned that the group failed to show a likelihood of success on the merits of their Equal Access Act claims.[102] The court found that the group was not entitled to partial preliminary injunctive relief on the narrow and specific grounds asserted in their motion.

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[100] Koltes v. Visiting Nurse Ass'n, 591 N.W.2d 578 [133 Educ. L. Rep. 1035] (Neb. 1999).

[101] Davison v. Santa Barbara High Sch. Dist., 48 F. Supp.2d 1225 [136 Educ. L. Rep. 291] (C.D. Cal. 1998).

[102] East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City, 30 F. Supp.2d 1356 [131 Educ. L. Rep. 1008] (D. Utah 1998).

Sanctions for Student Misconduct

Generally

A student challenged his adjudication of delinquency where he made threatening statements in the presence of, and directed to, a teacher who was assigned to monitor three students in a school hallway as they waited to meet with the principal. The boys were talking among themselves when the appellant talked about bringing a gun to school and shooting the principal and the teachers. An appellate court in Pennsylvania affirmed that the evidence supported the adjudication of the juvenile as a delinquent for the crime of terroristic threats.[103] The court contended that in light of recent incidents involving gun-related violence on school campuses, a statement by a student in the presence of a teacher that he would bring a gun to school had to be regarded seriously as an attempt to create fear and apprehension of a future violent act, or at the very least, a reckless disregard of the potential to create such fear and apprehension. The court added that a threat by a student to bring a gun to school can in no way be treated as a joke which can be casually disregarded.

A second-grade student was suspended habitually violating his school's dress code when, ignoring the principal's warning that boys were not allowed to wear earrings to school, his mother allowed him to wear a earring to school on numerous occasions. A month after her son's suspension, the mother filed a petition in district court for injunctive relief, seeking to prohibit the school from enforcing an earring ban against her son. Her petition was denied, and the plaintiff appealed based upon two issues: whether or not the gender-based rule was substantially related to the achievement of important government objectives and whether the state demonstrated persuasive justification for the gender-based rule. In affirming, an appellate court agreed that the rule prohibiting male elementary students from wearing earrings advanced legitimate educational objectives of the school by inspiring discipline and a positive learning environment, hence did not violate equal protection.[104]

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[103] In Re B.R., 732 A.2d 633 [136 Educ. L. Rep. 504] (Pa. Super. Ct. 1999).

[104] Jones v. W.T. Henning Elementary Sch., 721 So. 2d 530 [131 Educ. L. Rep. 330] (La. Ct. App. 1998).

Parents claimed that their children had been excessively disciplined by the use of corporal punishment by school administrators. The parents filed claims against administrators and teachers. The court refused summary judgment for the principal and former superintendent, and they appealed the decision. The Court of Appeals of Texas determined that summary judgment for the district did not require dismissal of claims against other defendants under the immunity provision of the Tort Claims Act.[105] The court further reflected that the use of a wooden paddle in discipline of students did not violate the students' substantive due process rights and supported the administrators' qualified immunity from section 1983 claims.

Parents sought damages for injuries suffered by their daughter from administration of corporal punishment. The mother had given prior approval for the use of corporal punishment. The administrator paddled the student after the girl refused to complete a report assigned for disciplinary reasons relating to her behavior in class. The district court entered a judgment in favor of the principal. The parents appealed based on procedural basis. The Court of Appeals of Mississippi reviewed the case and affirmed the decision in favor of the principal.[106]

The Court of Appeals of Ohio ruled that a single spanking using a wooden paddle did not inflict cruel and unusual punishment in violation of section 1983. The student received one swat for refusing to read in class and stating that reading is stupid. The teacher asserted that the student had called him stupid. The court found the school could administer corporal punishment, the administration was reasonable, and the paddling was warranted under the facts.[107]

In Indiana, a juvenile was tried as an adult and convicted in Superior Court for carrying a handgun on school property without a license and dangerous possession of a firearm. The student argued that he had no other adequate alternative, pointing out that his life was in danger because he was attempting to quit a violent street gang. In rejecting this argument, the court identified several alternative actions the student could have taken, including reporting the matter to his parents, reporting it to police officials, or being absent from school and explaining the absence to school officials. The record indicated efforts by school officials to avoid intimidation of students by disallowing the wearing of gang colors. Further, since the public high school comprising more than 3000 students had been plagued with gang activity necessitating armed guards on campus and periodic seizure of weapons, the court reasoned that the potential for serious bodily injury or loss of life to innocent bystanders and other students was immense. The juvenile next asserted that he had a state constitutional right to bear arms. The court rejected this assertion finding that the statutes at issue required a person to have a license to carry a handgun, increased the class of the offense for carrying an unlicensed handgun on school property, and prohibited the possession of a handgun by a person under the age of 18. Therefore, in affirming the lower court decision, the Indiana Court of Appeals held that the juvenile was not entitled to assert a defense of necessity and that the prosecution did not violate the juvenile's right to bear arms under the state constitution.[108]

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[105] Johnson v. Resendez, 993 S.W.2d 723 [135 Educ. L. Rep. 859] (Tex. App. 1999).

[106] Burnham v. Stevens, 734 So. 2d 256 [135 Educ. L. Rep. 1129] (Miss. Ct. App. 1999).

[107] Campbell v. Gahanna-Jefferson Bd. of Educ., 717 N.E.2d 347 [137 Educ. L. Rep. 1104] (Ohio Ct. App. 1998).

A talented football player was barred from athletic participation during his senior year for violation of the district's zero tolerance drug and alcohol policy. The police had picked the student up at an off-campus site and reported the incident to the school. Since this was the second violation of the policy, the assistant principal suspended him from participation during the football season. The court denied a motion for a preliminary injunction, and the appellate court affirmed the decision.[109] The court stated that the student had no protected property interest in participating in interscholastic athletics, and the possibility of a scholarship did not impact this interest. The court also found that the district did not violate his due process by not allowing cross-examination of witnesses. Even though the police officers violated the release of confidential information concerning a juvenile, the school officials could act on this information. The court found the administrators and the review process was appropriate, and the officials had not acted in an arbitrary and capricious manner.

The federal district court granted summary judgment to a teacher and school district relating to claims of false imprisonment, infliction of emotional distress, negligence, and violation of rights under section 1983. The junior high student had disrupted choir class and was sent to a room adjoining the choir room for three class periods. The student was not locked in the room and was allowed to do homework during this time. The court found no evidence of false imprisonment and no indication that a teacher could not discipline a student in this manner under Arkansas law.[110] The infliction of emotional distress would require evidence of outrageous conduct which was not evident in this case. The court ruled both defendants were immune from negligence claims. The court observed that there was not a violation of substantive due process stating the music library could not be construed as prison-like.

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[108] Dozier v. State, 709 N.E.2d 27 [133 Educ. L. Rep. 1011] (Ind. Ct. App. 1999).

[109] Jordan v. O'Fallon Township. High Sch. Dist., 706 N.E.2d 137 [133 Educ. L. Rep. 214] (Ill. App. Ct. 1999).

A high school student caught participating in a "senior prank" was assigned to cut weeds with dull scissors by a football coach. The student had poured gas on the football field and set the field on fire. The student injured his wrist during the disciplinary session and sued the principal and coach. The court granted summary judgment to both defendants. The Court of Appeals of Georgia reversed the decision in regard to the coach.[111] The court determined that evidence of actual malice existed which precluded summary judgment on the grounds of official immunity. Remarks and gestures made by the coach before and after the discipline indicated the possibility of ill-will toward the student.

Suspension of Students

Several students were suspended for gang-related activity based on their wearing similar colored shirts with gang insignia. The students were not allowed to tell their side of the story though information was exchanged between the parents and the administrator. The federal district court denied summary judgment to the district and administrator stating there was a question of whether the administrator had offered the proper opportunity for students to be heard.[112] The Fifth Circuit stated that a parent may serve as an acceptable surrogate for the student for satisfying due process requirements, but there is a question of whether this opportunity occurred in this case. The court affirmed the decision.[113] The Fifth Circuit denied a petition for rehearing stating that an administrator speaking with a parent does not necessarily meet the requirements of due process, and it will be left to the district court to make that determination.

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[110] Wallace v. Bryant Sch. Dist., 46 F. Supp.2d 863 [135 Educ. L. Rep. 488] (E.D. Ark. 1999).

[111] Hazelwood v. Adams, 510 S.E.2d 147 [132 Educ. L. Rep. 227] (Ga. Ct. App. 1998).

[112] Meyer v. Austin Indep. Sch. Dist., 167 F.3d 887 [132 Educ. L. Rep. 641] (5th Cir. 1999).

[113] Meyer v. Austin Indep. Sch. Dist., 161 F.3d 271 [130 Educ. L. Rep. 1078] (5th Cir. 1998) *cert. denied*, [1999 U.S. LEXIS 3482].

Where a high school student in Florida was discussing his participation in Civil War reenactments with a small group of friends when he pulled a small Confederate flag from his notebook, an assistant principal noticed the flag and ordered him to put it away. When the student tried to explain the discussion, the administrator took him to the office and suspended him. The student brought a section 1983 action against two assistant principals and the school board based on violation of First Amendment rights. A federal trial court dismissed the case against the two administrators based on qualified immunity and granted the board's motion for summary judgment. On further review, the Eleventh Circuit affirmed with regard to the board but reversed concerning the administrators.[114] The appellate court reviewed the evidence and found no reasonable basis for fear of disruption of the educational process. The court stated that this met the requirements stated under *Tinker*, and found that if the circumstances were as stated, there was evidence of a First Amendment violation. The court found that the assistant principals were not final decision makers within the school context and found no history or custom of prohibiting the display of the Confederate flag.

In the first of two cases from New York, a student was suspended for threatening conduct away from school when school was not in session. The court denied the petition to review the school district's decision, and the parents appealed. The appellate court agreed that the student and parent were given proper notice and that the district was within its discretion in suspending the student.[115]

Students sought damages for educational malpractice after being suspended from school. One of the students appealed to the state commissioner, and he upheld the five day suspension. An appellate court in New York ruled that the student was barred from litigating the suspension since he failed to request judicial review of the Commissioner's action. The court also stated that educational malpractice could not be determined by the courts of the state.[116]

High school students who attended a weekend, off-campus party challenged their suspensions for violating their school's alcohol possession policy. The court reviewed the evidence and found that the students had little likelihood of prevailing on the merits of the case under federal law. The court stated that high school extracurricular activities did not provide a property interest to be protected under the Due Process Clause and there is no protection for participation under the First Amendment.[117] The court denied injunctive relief stating the case does not raise a serious federal issue. The court went on to state that what happened to these students could certainly be questioned by any rational individual in terms of the harshness of the penalty, but these issues should be settled through state law.

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[114] Denno v. School Bd. of Volusia County, Fla., 182 F.3d 780 [136 Educ. L. Rep. 736] (11th Cir. 1999).

[115] Coughlan v. Board of Educ. of Liverpool Cent. Sch, 692 N.Y.S.2d 558 [136 Educ. L. Rep. 1014] (N.Y. App. Div. 1999).

[116] Livolsi v. Hicksville Union-Free Sch., 693 N.Y.S.2d 617 [137 Educ. L. Rep. 330] (N.Y. App. Div. 1999).

A high school student was suspended for fighting during school. When he returned to school, he was told the school district policy required that students suspended for fighting must take a urine test for drug and alcohol use. The student refused and was suspended. He was told if he failed again to take the test upon his return to school, this refusal would be an admission of unlawful drug use and expulsion proceedings would begin. The student sued claiming the district policy violated his rights under the Fourth and Fourteenth Amendments. The federal district court entered a judgment in favor of the school corporation, but the Seventh Circuit disagreed stating that statistical evidence between fighting and drug use was not sufficient to support the policy for the search, and the policy was not justified by special needs.[118] The court noted that the dean of students had met with the individual at the time of the original incident and had not noted any particular suspicion of drug use at that time.

The federal trial court in Minnesota granted summary judgment on a complex list of issues relating to the suspension of a high school student for numerous issues of misconduct. Following the suspension period, the parents elected to home-school the student for the remainder of the year and transferred him to another district the following year. The student claimed the school had inappropriately disseminated student record data to an in-school suspension teacher that claimed the boy had raped her daughter. The court ruled that as a teacher dealing with the student, the teacher could have access to this information. The student claimed that the district had violated state law by not giving him prior notice of his suspension, but the court found the state did not authorize a private cause under this statute. The student stated that the district violated rights granted under the district's student manual. The court stated that the requisite elements of a contract did not exist between a district and a student. The student sought a section 1983 claim for violation of his procedural due process, but the court found no district policy or custom to provide a cause for action against the district and found that in relation to individual defendants he had received the due process required for a suspension proceeding. Finally, he alleged the district had violated his rights under FERPA by releasing educational records. The court observed no district policy or custom that supported this allegation. The one time release of information was not sufficient to support a claim under section 1983. The court dismissed all claims against the defendants.[119]

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[117] Farver v. Board of Educ. of Carroll County, 40 F. Supp.2d 323 [134 Educ. L. Rep. 158] (D. Md. 1999).

[118] Willis By Willis v. Anderson Community Sch., 158 F.3d 415 [130 Educ. L. Rep. 89] (7th Cir. 1998).

Where a student was suspended five days for calling a girl a "ho," he sought and received a temporary injunction since the principal did not follow the requirements of the state Pupil Fair Dismissal Act (PFDA). The appellate court reversed the decision finding an abuse of discretion by the lower court.[120] The court indicated that the act provided for appeals to the Commissioner of Children for expulsions, and these decisions could then be appealed to the court. The court also said the PFDA was directory in nature rather than mandatory. Failure to follow all the steps does not provide for a private cause of action. Finally, the court noted that there was not evidence of irreparable harm necessary to issue an injunction.

An African-American middle school student sued her principal claiming she violated her civil rights, due process, and equal protection rights under both federal and state law after she was suspended for distributing a controlled substance and recommended her expulsion. A federal trial court in California granted the principal's motion for summary judgment insofar as it found that she treated the student the same as any other child, had followed all due process procedures including proper notice and hearing, and had followed all procedures required by state law.[121]

A student was suspended for drawing a Confederate flag during math class. The district stated the student had violated a district policy against racial harassment or intimidation. The student sued alleging the school violated his First Amendment rights. The court found that the policy was not overly broad and was within the districts's lawful authority to teach students to work within boundaries of social behavior. The policy also did not restrict content of expression and was not vague. The court ruled that this case concerns the district's response to a student's willful violation of a school policy. The federal district court denied a motion for declaratory and injunctive relief.[122]

In Utah, an appellate court affirmed that a high school student had received appropriate procedural due process proceedings for a ten-day suspension for using marijuana on a school band trip.[123] The principal had offered several opportunities for the student to tell his side of the story, but the student had refused stating his father had told him not to say anything unless the father was present. The court offered that the "informal give-and-take session" met the requirement of an opportunity to be heard.

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[119] Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp.2d 664 [135 Educ. L. Rep. 143] (D. Minn. 1999).

[120] Eason v. Independent Sch. Dist. No. 11, 598 N.W.2d 414 [137 Educ. L. Rep. 373] (Minn. Ct. App. 1999).

[121] Dornes By and Through Lopez v. Lindsey, 18 F. Supp.2d 1086 [130 Educ. L. Rep. 525] (C.D. Cal. 1998).

[122] West v. Derby Unified Sch. Dist. #260, 23 F. Supp.2d 1223 [130 Educ. L. Rep. 1186] (D. Kan. 1998).

An elementary student was suspended after an extensive history of misconduct. The school administrators had made numerous efforts to work with the child's parents. The parents brought a section 1983 claim against school officials claiming failure of due process procedures, violation of the student's privacy, unlawful search and seizure, interference with the parents' right to direct the upbringing of their child, injury to reputation, failure to comply with requirements of Individuals With Disabilities Education Act (IDEA) and section 504, and violations of equal protection rights. The court reviewed each claim and found that either the parents did not establish a claim or the defendants had acted appropriately and dismissed claims against school officials.[124]

Expulsion of Students

A school board expelled a seventh grade student for a period of one year for possessing a Swiss army knife in class. The school board was following their "zero tolerance" policy for weapons in schools. The student claimed that he had found the knife and had meant to turn the knife over to his teacher. The court decided that the board had violated the substantive and procedural due process requirements of the state code. The board had failed to develop a written policy and did not allow the superintendent the discretion to modify the punishment on a case-by-case basis. The appellate court affirmed the decision to sustain the student's appeal stating that the board had exceeded its authority.[125]

A student was expelled for bringing a shotgun to school in his truck. He maintained that he forgot to remove the gun after a weekend hunting trip. He appealed the decision to the superintendent, and the expulsion was changed to a transfer to an evening alternative education program. The school board heard the case and allowed the superintendent's decision to stand. The student sought an injunction which was granted in district court. The district appealed and the Court of Appeals of Texas ruled that the action was not an expulsion and was not within the court's jurisdiction.[126] The appellate court vacated the injunction upholding the board's decision as final and not appealable.

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[123] Atcitty v. San Juan County Sch. Dist., 967 P.2d 1261 [130 Educ. L. Rep. 1342] (Utah Ct. App. 1998).

[124] Jensen ex. rel. C.J. v. Reeves, 45 F. Supp.2d 1265 [135 Educ. L. Rep. 447] (D. Utah 1999).

[125] Lyons v. Penn Hills Sch. Dist., 723 A.2d 1073 [132 Educ. L. Rep. 490] (Pa. Commw. Ct. 1999).

The Court of Appeals of Washington reversed and remanded a school expulsion decision.[127] The court stated that a high school student could confront and question adverse witnesses at an expulsion hearing. The student had been suspended six times previously for fighting and intimidation. At the hearing, only the assistant vice principal testified. The plaintiff's lawyer requested to confront and cross-examine the witnesses but none were available. The appellate court stated that the student had a substantial interest in attending school, and the lack of opportunity to question eyewitnesses was a violation of due process.

The court of appeals agreed with the opinion of a lower court that the school board presented no evidence that a student actively participated in a bomb threat at a high school.[128] The student had been expelled for the remainder of the year for participating in calling in a bomb threat at the high school. The student had been part of the group that discussed the bomb threat but had not actively encouraged or actively participated in calling in the threat. The court recognized the "foibles of youth and the special environment that is high school." Having knowledge of events including daring, boasting, and bragging at lunch tables does not provide evidence of active participation. The court declared that only those that actually carried out the act violated the rules.

Desegregation

Desegregation Plan Oversight

A civil rights organization brought a school desegregation suit against the State of New York, City of Yonkers, Urban Development Corporation (UDC), and others. A federal trial court, in considering whether the UDC's conduct constituted a continuing wrong, held that it retained statutory authority to participate in remedying the racially segregated housing situation.

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[126] Aledo Indep. Sch. Dist. v. Reese, 987 S.W.2d 953 [133 Educ. L. Rep. 1078] (Tex. App. 1999).

[127] Stone v. Prosser Consol. Sch. Dist., 971 P.2d 125 [131 Educ. L. Rep. 1134] (Wash. Ct. App. 1999).

[128] Goldwire v. Clark, 507 S.E.2d 209 [130 Educ. L. Rep. 1352] (Ga. Ct. App. 1998).

As such, the court was convinced that the UDC's failure to do so constituted continuing wrong precluded a statute of limitations defense.[129]

Following remand of a school desegregation case, the federal district court found that the school system still labored under vestiges of *de jure* segregation and entered a remedial order. The state and city appealed. The Second Circuit held that plaintiffs, not the State, bore the burden of persuasion on the issue of whether vestiges of segregation remained in the city's schools, and evidence that school district's curriculum and teaching techniques were insufficiently multicultural was legally insufficient to constitute a vestige of segregation.[130] Also, evidence was insufficient to support a conclusion that low teacher expectations for minority students constituted a vestige of prior segregation. The court contended that a finding of prior segregation, coupled with a finding of present day racial differences in educational achievement, is an insufficient positive test for the presence of residual segregative effects. Enhanced funding exceeded the broad power of the district court, yet the district court did not abuse its broad remedial discretion in apportioning to the state half the compliance costs for the earlier remedial order.

In an ongoing school desegregation action, all parties moved for court approval of a memorandum of understanding resolving outstanding issues, removing the matter from court's active docket, and anticipating grant of unitary status at the end of fiscal year 2002. The federal district court agreed that the memorandum of understanding and the comprehensive plan met the requirements of due process.[131]

In a school desegregation case, the federal district court held that the school district achieved unitary status in all respects and therefore the court would dissolve its 30-year-old desegregation order.[132] The court also found that the school district's magnet school admissions policy went beyond constitutionally permissible bounds. It was not narrowly tailored and was not within the guidelines of the desegregation plan.

A motion was filed to modify a school desegregation consent decree and to terminate judicial supervision of student-school assignments. The federal district court entered an order modifying the consent decree to eliminate all further student assignment obligations and declared that the district had achieved partial unitary status as to student assignments. The Sixth Circuit affirmed that a material factual change and unforeseen circumstance warranted modification of the decree, and Cleveland City School District was entitled to a declaration of unitary status with respect to pupil assignments in the desegregation case.[133] Finally, fees were properly limited to market rates necessary to encourage competent lawyers to undertake the representation in question, and the fee determination did not disregard the law of the case.

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[129] United States v. Yonkers Bd. of Educ., 30 F. Supp.2d 650 [131 Educ. L. Rep. 990] (S.D.N.Y. 1998).

[130] United States v. City of Yonkers, 181 F.3d 301 [136 Educ. L. Rep. 301] (2nd Cir. 1999); U.S. v. City of Yonkers, 181 F.3d 301 [136 Educ. L. Rep. 663] (2nd Cir. 1999).

[131] Vaughns v. Board of Educ., Prince George's County, 18 F. Supp.2d 569 [130 Educ. L. Rep. 143] (D. Md. 1998).

[132] Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp.2d 228 [137 Educ. L. Rep. 934] (W.D.N.C. 1999).

Following remand, parties moved for approval of proposed settlement agreements in a 31-year-old school desegregation class action. It was found that the school district had satisfactorily complied with the initial decree, had no need for continued judicial control, and had demonstrated good-faith commitment to the court decree. The court granted that the proposed settlement agreements were fair, adequate, and reasonable, and therefore would be approved.[134]

Pursuant to a comprehensive remedial decree in a school desegregation case, the judge entered budget orders and implementation of the decree as modified for two fiscal years. The board of education appealed these orders, and individual members moved to intervene as appellants. The federal district court denied the intervention motion, and individual members appealed. Upon consolidating appeals of board and members, the Seventh Circuit deferred to the district court concerning design and funding of programs to achieve objectives of decree.[135] The school board was precluded from objecting to special master's *ex parte* communications. The magistrate judge had the authority to rule on this motion to intervene, and the individual board members did not have standing to intervene.

After the settlement agreement in a school desegregation case was approved, the State of Missouri moved for declaration that it would not be liable for any future attorney fees incurred after the settlement approval date. The federal district court held the district liable for attorneys' fees, and the district appealed. The Eighth Circuit reversed and remanded the case stating that the state was liable for attorney fees.[136]

The federal district court approved settlement of a school desegregation action and denied the State's claim that the school district was unitary. The court stated that it was not the court's duty to insure funding for the district and denied that there was a financial vestige that had to be remedied. The district appealed. The Eighth Circuit recognized that the issue of funding for school construction projects ordered in the case was not ripe and dismissed the appeal.[137]

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[133] Reed v. Rhodes, 179 F.3d 453 [135 Educ. L. Rep. 929] (6th Cir. 1999).

[134] Berry v. School Dist. of City of Benton Harbor, 184 F.R.D. 93 [132 Educ. L. Rep. 817] (W. D. Mich. 1998).

[135] People Who Care v. Rockford Bd. Of Educ., 171 F.3d 1083 [133 Educ. L. Rep. 708] (7th Cir. 1999).

[136] Jenkins by Jenkins v. State of Missouri, 158 F.3d 980 [130 Educ. L. Rep. 110] (8th Cir. 1998).

Students of Chinese descent, who had been denied enrollment in public schools of their choice because of ethnically-based enrollment limitations in a desegregation consent decree, brought a section 1983 class action alleging that the consent decree's ethnically-based student assignment plan constituted race discrimination in violation of the Equal Protection Clause. The federal district court approved that the settlement was fair, reasonable, and adequate.[138]

A school district sought a declaration of unitary status. The district had followed guidelines which prevented any school from being identified as a majority or minority school for several years and had announced its continuing commitment to diversity and intolerance of discrimination. The federal district court reasoned that the district's good-faith compliance with desegregation orders for several years warranted declaration of unitary status.[139]

On application of intervenors in a school desegregation case, the federal district court vacated a consent decree and dismissed the case on grounds that a 1973 order had found that the school district had achieved unitary status. Plaintiffs and the district appealed. The Eleventh Circuit concluded that the 1973 order was not intended to be a finding that the school district had achieved unitary status. The appellate court reversed and remanded the case for further action.[140]

A school desegregation case was recommitted for determination of whether the county school system had achieved unitary status. The federal district court observed that the school board was charged with the duty to desegregate public schools to the maximum extent practicable, and attainment of unitary status can serve as a sufficient change in circumstances to warrant dissolution of a consent decree.[141] The board's failure to fully discharge its affirmative duty to desegregate the school system indicated that the district had not been desegregated to the maximum extent practicable.

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[137] Jenkins v. State of Mo., 158 F.3d 984 [130 Educ. L. Rep. 114] (8th Cir. 1998).

[138] San Francisco NAACP v. San Francisco Unified Sch., 59 F. Supp.2d 1021 [138 Educ. L. Rep. 295] (N.D. Cal. 1999).

[139] Brown v. Unified Sch. Dist. No. 501, 56 F. Supp.2d 1212 [137 Educ. L. Rep 931] (D. Kan. 1999).

[140] United States v. State of Georgia, 171 F.3d 1344 [133 Educ. L. Rep. 730] (11th Cir. 1999).

[141] Manning v. School Bd. of Hillsborough County, Fla., 24 F. Supp.2d 1277 [131 Educ. L. Rep. 54] (M.D. Fla. 1998).

The court also held that the board had no continuing duty to maintain a particular Black to white student ratio on a school-by-school basis. While the board was complying in good faith with the court's desegregation orders with regard to faculty and staff assignment, the board could not be charged with a duty that never existed under the desegregation decree to monitor disproportionate burden of bussing on Black students. Finally the board had to provide the plaintiffs with the necessary documentation so that they could conduct an independent analysis and provide input. The report and recommendation were adopted in part and rejected in part.

In a continuing desegregation action, a school district filed a motion to amend or alter the judgment, and the court elected to treat this as a motion for clarification of the order previously entered. The district court declined to set forth specific desegregative devices to be employed by the district and stated that the parties' opinions concerning effectiveness of the district's desegregative actions had no bearing on a determination of unitary status.[142] Also, the district was required to provide the court with additional statistical information concerning particular programs, and the district was not required to ensure that racial balance in every school in the system precisely matched that of the general population. The court recognized that the district's failure to act to remedy segregation, alleged by the district to have resulted from demographic trends, could serve as basis for denial of unitary status. The requirement that the district continue to consider busing burdens in assignment and site selection decisions did not impose new reporting obligations. The court denied the motion to amend or alter and granted in part the motion for clarification.

A school board filed a petition seeking modification of a consent decree in a longstanding school desegregation case. The district sought to close a predominantly African-American high school and transfer the grades nine through twelve students to a predominantly white high school. The federal district court, in denying the petition, held that the board had failed to show that unforeseen obstacles centered around curricular offerings and academic quality rendered the consent decree unworkable.[143] Also, the board had not proven that implementation of the plan would be in the public interest of the African-American students and community.

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[142] Manning v. School Bd. of Hillsborough County, 28 F. Supp.2d 1353 [131 Educ. L. Rep. 728] (M.D. Fla. 1998).

[143] Lee v. Autauga County Bd. of Educ., 59 F. Supp.2d 1199 [138 Educ. L. Rep. 324] (M.D. Ala. 1999).

Cross-District Remedies

In continuing desegregation litigation, a parish school board moved for declaratory judgment to invalidate a Louisiana constitutional amendment and statue designed to divide the parish school district into two districts. The district court struck down this statute and amendment as unconstitutional. The State Attorney General appealed. The Fifth Circuit decided that the district court's orders declaring the state statute unconstitutional would be vacated, and the case would be remanded to the federal district court to allow the State of Louisiana a full opportunity, after a board of trustees had been selected, to defend its creation of the new school district.[144] The court gave the state an opportunity to discharge its burden of demonstrating that the newly created district would not adversely impact the desegregation plan currently in place.

State Court Cases

Less than two years after a state appellate court ordered the state to give priority to remedying racial, ethnic, and economic isolation existing in Hartford, Connecticut schools, plaintiffs sought relief. They alleged that the state's actions were inadequate. The state court agreed that the state had complied with the decision of the appellate court.[145]

In ongoing school desegregation proceedings initiated by Pennsylvania Human Relations Commission (PHRC), a trial court ordered the Commonwealth, Governor, city, and mayor to be joined as additional respondents. The Commonwealth and Governor applied for preliminary relief. After assuming plenary jurisdiction, the appellate court determined that enforcement proceedings are in appellate, rather than original, jurisdiction of the Commonwealth Court, and the Commonwealth Court was not authorized to order joinder of additional parties. The appellate court vacated and remanded the decision.[146]

Conclusion

The courts continue to support school personnel who take carefully planned and appropriate actions concerning students. When districts ignore the established precedent of the law, the ramifications can be severe against both districts and personnel. Although many areas of the law regarding pupils are in transition as a result of changing school culture and environment, this responsibility can be met by fair and knowledgeable school personnel who consider all options and make reflective decisions based on legal precedent. School personnel must provide a safe and orderly school, while providing equal educational opportunity to all children.

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[144] Valley v. Rapides Parish Sch. Bd., 173 F.3d 944 [134 Educ. L. Rep. 695] (5th Cir. 1999).

[145] Sheff v. O'Neill, 733 A.2d 925 [136 Educ. L. Rep. 950] (Conn. Super. Ct. 1999).

[146] PHRC v. School Dist. of Philadelphia, 732 A.2d 578 [136 Educ. L. Rep. 495] (Pa. 1999).

4
BARGAINING

Julie F. Mead

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Introduction

This chapter reviews cases concerning various aspects of labor relations between schools and their employee unions. These cases interpret provisions of the United States Constitution and construe numerous federal and state statutes with respect to collective bargaining relationships. Cases are grouped according to subject matter and within subjects, depending on the state in which the dispute arose.

Constitutional Issues

Four cases examine claims of constitutional violations. Three cases considered guaranteed rights under the first Amendment and, one interpreted the Fourteenth Amendment.

First Amendment

An appellate court in New York affirmed that school officials violated the First Amendment's guarantee of free speech when they attempted to forestall a teachers union from distributing literature to private donors of the school.[1] The court agreed that the actions of officials amounted to prior restraint on speech that they could not show furthered any compelling state interest. The court characterized as "speculation" the officials' concern that the letter would have a negative impact on financial donations.

In Ohio a federal trial court in Ohio refused to consider a teacher's claims of violation of free speech and due process associated with his termination.[2] The court held that state law precluded the teacher's claims, since they had already been aired in an administrative hearing and state statutes established the right to appeal in state court.

The First Amendment's guarantee of freedom of association was at issue in Indiana. Non-union teachers challenged the provision of a collective bargaining agreement that allowed the collection of fair use fees. The teachers alleged that the provisions were unconstitutional because they required non-members to pay a fee that was equal to the full amount charged members, including political and ideological expenses. The teachers also claimed that the union's failure to escrow any disputed fees violated the First Amendment. The union countered that non-members had the option of waiting to pay any fees until after an arbitrator calculated a fee amount that excluded political or ideological expenses. An appellate court agreed with the union and affirmed a grant of summary judgment in its favor.[3] The court determined that the option to postpone payment until after an arbitrator's calculation of the fee rendered the provision consistent with the Constitution. As to escrow fees, since non-members selecting the option to wait for an arbitrator's fee calculation had not yet paid any fees, the court was satisfied that there were no disputed monies to place in escrow.

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[1] Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers, Local 1532, 685 N.Y.S.2d 754 (N.Y. App. Div. 1999).

[2] Featherstone v. Columbus Pub. Schs., 39 F. Supp.2d 1020 [134 Educ. L. Rep. 152] (S.D. Ohio 1999).

Fourteenth Amendment

A bus company in New York alleged that a school board violated its due process rights under the Fourteenth Amendment by terminating its contract with the district following a labor strike against the bus company. A federal trial court found that the claim could not survive since the contractor had sufficient and meaningful post-deprivation remedies available through state law.[4] The court was of the opinion that the contractor's failure to file a state law action effectively waived its claim that the district had deprived it of a property interest without due process of law.

Federal Statutory Issues

Plaintiffs prevailed against school districts in three of the four cases that explored the application of federal labor laws. A dispute between a school district in Texas and a group of athletic trainers focused on the scope of the Fair Labor Standards Act (FLSA). The trainers, each of whom worked in excess of sixty hours per week, argued that they were entitled to overtime pay under the FSLA. The district countered that the FSLA did not apply as the trainers fell under the "professional exemption" of the Act. The Fifth Circuit agreed with the district and ruled that the trial court should have granted its request for summary judgment.[5] The court applied the so-called short test established by the regulations in order to ascertain that the professional exemption applied to the trainers. Applying the two required inquiries, the court concluded first that the trainers met the definition of "learned" since their state certification required a particularized course of study and second that their work required the consistent exercise of discretion and judgment.

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[3] Whitley County Teachers Ass'n v. Bauer, 718 N.E.2d 1181 [139 Educ. L. Rep. 602] (Ind. Ct. App. 1999).

[4] Van-Go Transport Co. v. New York City Bd. of Educ., 53 F. Supp.2d 278 [136 Educ. L. Rep. 880] (E.D.N.Y. 1999).

[5] Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521 [137 Educ. L. Rep. 516] (5th Cir. 1999).

In another case involving athletic personnel, a federal trial court in Alabama decided that a public school district athletic director met the definition of employer under the Equal Pay Act (EPA) in a suit brought by a female coach.[6] The court pointed out that the administrator had control over the coach, supervised her daily activities, and reported directly to the school board. Therefore, the teacher's EPA claim survived a motion to dismiss and was allowed to go forward.

A dispute from Iowa focused on an application of the Family Medical Leave Act (FMLA). A teacher requested leave to care for her ailing mother. The superintendent denied the leave on the grounds that the teacher had not followed the proper procedure for making the request, that she had already been absent too many times, and that her mother did not have a serious health condition. In a meeting with the principal to discuss the denial of her request, the teacher informed him that she would take the leave anyway, as entitled under the FMLA. After first requesting her resignation, the superintendent recommended, and the board of education approved, a ten-day suspension without pay as punishment for her insubordination and neglect of duty. The teacher first asked the union to help her advocate for her rights, but it refused because she was not a member of the association. The teacher then filed suit in federal trial court which discerned that her written request for leave, although simply a handwritten note, was timely and sufficiently detailed to satisfy the requirements of the FMLA.[7] The court noted that since the teacher's mother had a condition that resulted in a period of incapacity lasting more than three days and required ongoing treatment for a number of chronic serious health concerns, she had a "serious health condition" as contemplated by the FMLA, and that the district had to approve the teacher's request for leave. As such, the court declared that the ten-day suspension without pay constituted an unlawful retaliation against the teacher for the exercise of protected rights. The court rejected the district's claims that the teacher should have exhausted the grievance procedures under the collective bargaining agreement before bringing suit.

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[6] Blalock v. Dale County Bd. of Educ., 33 F. Supp.2d 995 [132 Educ. L. Rep. 476] (M.D. Ala. 1999).

[7] Ozolins v. Northwood-Kensett Community Sch. Dist., 40 F. Supp.2d 1055 (N.D. Iowa 1999).

The court observed that once the union refused her request for assistance, the teacher was left with no recourse but to litigate the matter. The court also posited that the negotiated contract did not clearly mandate that her complaint had to be grieved even if the teachers association had been more responsive.

A transportation contractor in New York City sued the school board for its actions in relation to a strike brought against it. The contract between the transportation company and the board required the latter to certify each bus driver prior to beginning work. Certification involved fingerprinting and submission to a criminal background check, mental fitness report, drug test, and training course. Given the time required to conduct full background checks, the usual practice called for the board to certify drivers conditionally pending the FBI's return of fingerprint evaluations. When the company learned that its workers planned a strike in April 1994, the board refused to certify replacement drivers conditionally. An April 1994 letter from a board official to the company indicated that it would not certify drivers conditionally to act as strike breakers.[8] A July 1995 letter revealed that the board would accept a total number of conditionally certified drivers no greater than 20% of the company's total staff. A federal trial court in New York explained that the board improperly interfered with the bus company's right, guaranteed under the National Labor Relations Act (NLRA), to hire replacement workers when faced with a strike. The court maintained that the board's refusal to conditionally certify workers had the both the purpose and effect of throwing its weight behind one of the parties in a labor-management dispute.

Recognition and Representational Issues

Plaintiffs brought suit to test issues of union recognition and representation in three cases. Two of the three courts returned decisions favoring the union position. Three small teachers unions attempted to have the Supreme Judicial Court of Massachusetts permit a small union exception to the requirement that unions collecting agency fees from non-members provide them with an independent financial audit. The requirement for such an audit was established by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*.[9] The unions claimed that requiring such a costly procedure would have been unduly burdensome and would have rendered the collection of fair use fees futile. The court rejected this argument in contending that state statutes merely allow the collection of such fees, but certainly do not require them.[10]

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[8] Van-Go Transport Co. v. New York City Bd. of Educ., 53 F. Supp.2d 278 [136 Educ. L. Rep. 880] (E.D.N.Y. 1999).

[9] 475 U.S. 292 (1986).

A school district in Oregon and its teachers' union differed over whether early childhood interventionists could be included in the teachers union. The district argued that since the interventionists did not need state licenses from the state, they could not be in the same bargaining unit as teachers because state law prohibits the inclusion of both academically licensed employees and those who are not in the same unit. The Employment Relations Board wrote that the interventionists fell under the broad title of academically licensed since their work involved direct contact with children and they had to have at least a bachelor's degree in early childhood education, special education, or a related field. After an exhaustive review of legislative history, an appellate court affirmed the administrative adjudication.[11]

When a teacher was not hired as a principal due to her active involvement with a union, the scope of the protection of Pennsylvania's Public Employee Relations Act (PERA) came under scrutiny. The teacher argued that PERA's prohibition against discriminating against union members for their activities protected her throughout the application process. The district conceded that it had rejected the teacher's application on those grounds, but argued that PERA did not apply since the principal's position was not protected. The Supreme Court of Pennsylvania reinstated a ruling in favor of the teacher on the basis that she was fully protected by PERA at the time of the discriminatory treatment and would remain so until such time as she advanced to a management position.[12] The court reached this result by following the reasoning of federal courts considering the scope of the NRLA in similar situations.

Rights and Obligations of Exclusive Bargaining Representatives

The rights and obligations of employee unions were examined in five cases. Four of the five actions were brought by teachers who alleged that their representative organizations failed to fulfill their obligations. An appellate court in Massachusetts considered the effect of the state's Education Reform Act on collective bargaining agreements. The court affirmed an administrative determination that the Act did not abrogate negotiated agreements with school districts insofar as they concerned terms and conditions of employment or procedures for making appointments, as opposed to decisions about hiring and firing designated categories of school employees.[13]

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[10] Wareham Educ. Ass'n v. Labor Relations Comm'n, 713 N.E.2d 363 [136 Educ. L. Rep. 546] (Mass. 1999).

[11] Linn-Benton-Lincoln Educ. Ass'n v. Linn-Benton-Lincoln ESD, 989 P.2d 25 [139 Educ. L. Rep. 1062] (Or. Ct. App. 1999).

[12] Uniontown Area Sch. Dist. v. Pennsylvania Labor Relations Bd., 732 A.2d 607 [136 Educ. L. Rep. 500 (Pa. 1999).

A non-tenured teache. in Alabama teacher facing the nonrenewal of her contract requested legal assistance from the Alabama Education Association (AEA). The AEA denied her request because it believed that her case could not be won. However, the union sent the teacher a letter informing her that if she obtained private counsel and won her dispute against the board, it would reimburse her for legal fees up to sixty dollars per hour and court costs. After winning a settlement and reinstatement, the teacher submitted her bill for attorney's fees in the amount of $15, 980.65 to the union. The union paid $11,985, an amount equal to those fees they believed to be reasonable and customary. The teacher filed suit to recover the difference between the two figures. A trial court entered a judgment in the teacher's favor and the union appealed. An appellate court first rejected the union's assertion that the settlement agreement between the district and the teacher precluded her suit against the union.[14] However, the court did agree with the union that its promise of attorney's fees should be interpreted to mean only reasonable and customary fees and that the teacher could not recover any fees or costs already reimbursed by the district. As such, the court remanded for further proceedings over the amount of reasonable attorney's fees.

A federal trial court in Ohio refused to consider a teacher's complaint that his union breached its duty of fair representation. The court recognized that Ohio law requires any such complaint to first be heard by the State Employment Relations Board.[15] The court rejected the teacher's claim because he attempted to bypass this step by filing directly in federal court.

Similarly, a teacher in New York claimed that his association violated his right to fair representation in his dispute with his school district over his attempt to rescind his resignation. An appellate court was of the view that the teacher's claim against the union was insufficient because it failed to set out a complaint that its individual members authorized or ratified what he thought was substandard representation of his complaint against the district.[16]

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[13] School Comm. of Lowell v. Labor Relations Comm'n, 707 N.E.2d 828 [133 Educ. L. Rep. 232] (Mass. App. Ct. 1999).

[14] Alabama Educ. Ass'n. v. Black, 752 So. 2d 514 (Ala. Civ. App. 1999).

[15] Featherstone v. Columbus Pub. Schs., 39 F. Supp.2d 1020 [134 Educ. L. Rep. 152] (S.D. Ohio 1999).

[16] Walsh v. Torres-Lynch, 697 N.Y.S.2d 434 (N.Y. App. Div. 1999).

In contrast, two teachers in Illinois prevailed in their allegation that their union breached its duty of fair representation.[17] The dispute arose from the negotiation of new provisions for calculating summer band pay. Evidence showed that the local union president withheld information, misled teachers about the financial impact of the changes, and ultimately withdrew his support for a re-negotiated addendum to the contract to return the band teachers to a pay level commensurate with earlier contracts. The Illinois Educational Labor Relations Board (IELRB) decreed that the union president behaved with hostility toward the two teachers, resulting in unfair representation. An appellate court agreed that the remedies fashioned by the IELRB were well within its discretion since it ordered the union to compensate the teachers for missing pay and to send a copy of the order to each union member. The court deemed the latter remedy appropriate since the union president unfairly criticized the two teachers in a union newsletter without giving them an opportunity to counter the false statements made about them. The court commented that distributing the IELRB's order simply set the record straight.

Scope of Bargaining

Only three cases concerned the scope of collective bargaining and whether given topics were prohibited, mandatory, or permissive subjects of negotiations. Unions prevailed in compelling negotiations in two of three cases.

When a school district in New York used a local Board of Cooperative Educational Services (BOCES) to handle its printing services, an employee union alleged that the issue should have been subject to mandatory collective bargaining. The Public Employment Relations Board (PERB) disagreed and dismissed the complaint. After a trial court upheld the PERB, the union sought further review. An appellate court reversed in favor of the union.[18] The court asserted that the statutory term "other such services" in the legislation authorizing districts to contract with BOCES for various services did not include printing services. Instead, the court it acknowledged that since this term referred only to educational and nurturing services, the district was obligated to bargain the issue of subcontracting its printing services with it employees union.

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[17] Paxton-Buckley-Loda Educ. Ass'n v. The Illinois Educ. Labor Relations Bd., 710 N.E.2d 538 (Ill. App. Ct. 1999).

[18] Vestal Employees Ass'n v. Public Employment Relations Bd., 688 N.Y.S.2d 712 [134 Educ. L. Rep. 999] (N.Y. App. Div.1999).

When a district in Colorado refused to pay salary increments to members of its union of educational office personnel for the 1994-95 school year, the union sued for breach of contract. The collective bargaining agreement contained a provision that called for the renegotiation of the salaries if necessary as a result of the legal budget adoption process. This provision was added to comply with state statutes that seek to avoid deficit spending by requiring annual negotiation of wages and salaries. The union argued that renegotiation could only occur if requested between March 1 and 7 as stated in another contract provision. An appellate court ruled in favor of the school district.[19] The court concluded that the provisions set up two ways that renegotiation could occur: one during the specified calendar window and the other whenever budgetary shortfalls became known. In this instance, the court was satisfied that the district attempted to renegotiate salaries given the impact of the passage of an amendment to the Colorado Constitution. The court noted that limiting renegotiation to a short time frame would have violated state statutes. In addition, the court was convinced that since the union's refusal to respond to the district's request effectively waived its right to renegotiate, the district was within its rights to set the salary scale unilaterally.

A school district challenged a determination of the Public Employee Labor Relations Board (PELRB) that its teacher evaluation procedure was a mandatory subject of bargaining. The district argued that the changes in the procedure, despite language regarding the same in the collective bargaining agreement in force, fell within the managerial policy exception to mandatory negotiation under state law. On further review, the Supreme Court of New Hampshire affirmed in favor of the union.[20] The court pointed out that since the evaluation procedures did not constitute selection or direction of employees under state law, it was not a prohibited subject of bargaining. At the same time, the court found it unnecessary to consider whether the topic was mandatory or permissive, holding instead that since the current negotiated agreement included language directing various evaluation procedures, any changes had to be accomplished through the bargaining process. Yet, the court cautioned that although the district was compelled to bargain in this instance, the same result did not necessarily apply to all future changes in teacher evaluations.

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[19] Denver Ass'n of Educ. Office Personnel v. School Dist. No. 1 in the City and County of Denver, 972 P.2d 1047 [132 Educ. L. Rep. 978] (Colo. Ct. App. 1999).

[20] Appeal of Pittsfield Sch. Dist., 744 A.2d 594 [141 Educ. L. Rep. 847] (N.H. 1999).

Grievability and Arbitrability

The grievability and arbitrability of various disputes was the focus of thirteen cases in 1999, this year's largest category. Twelve of these claims centered on the arbitrability of complaints, while two considered procedural issues related to arbitration. Interestingly, seven of the cases in this section involved disagreements between school districts and unions in the state of New York.

Presumption and Arbitrability

A teachers union in New York prevailed against a district's motion for a stay in a dispute over whether changes in deductibles, a co-payment cap, and the definition of usual, customary, and reasonable allowances related to health insurance created an arbitrable issue. The district argued that the issue was outside the scope of arbitration since the insurance carrier made the changes. An appellate court was of the view that the broad arbitration clause in the parties' collective bargaining agreement rendered the matter arbitrable since it related to benefits delineated in the agreement.[21] According to the court, the fact that the carrier, not the district, made the changes was irrelevant to the issue of arbitrability.

The arbitrability of grievances by two unions over changes in a health insurance co-payment cap was at issue in a consolidated case before the Court of Appeals of New York. A lower court granted the district's motions for stays of arbitration. The court of last resort reversed, declaring that the intermediate panel erred in considering the nature of the dispute and in interpreting the scope of the substantive provisions of the collective bargaining agreements involved.[22] By applying its own precedent in *Matter of Acting Superintendent of Schools of Liverpool Central School District*,[23] the court posited that state law does not create a presumption either for or against arbitrability, and if there is a reasonable relationship between the subject matter of a dispute and the general subject matter of a bargaining agreement, the issue should be deemed arbitrable. As a cap on employee health insurance co-payments was reasonably related to the benefits clauses of both contracts, the court decided that the disputes should have been submitted for arbitration.

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[21] Matter of Jefferson-Lewis-Hamilton-Herkimer-Oneida Counties Bd. of Coop. Servs., 689 N.Y.S.2d 813 [135 Educ. L. Rep. 583] (N.Y. App. Div. 1999).

[22] Matter of Bd. of Educ. of Watertown City Sch. Dist., 688 N.Y.S.2d 463 [134 Educ. L. Rep. 984] (N.Y. 1999).

[23] 399 N.Y.S.2d 189 (N.Y. 1977).

Similarly, another appellate court in New York ordered a district to submit to arbitration where it had begun proceedings pursuant to state law against fifteen teachers for repeated occurrences of lateness. The union filed grievances charging that the district failed to follow the procedure negotiated through a memorandum of understanding that was later incorporated into the bargaining agreement. The court affirmed that arbitration was proper since there was a reasonable relationship between the subject of the dispute and the subject matter of the negotiated contract.[24]

Conversely, a school district in New York obtained a stay of arbitration when a union challenged the subcontracting of some staff positions with the BOCES.[25] Applying the *Liverpool* test, the court affirmed that although the subject matter of the claim could be arbitrated under state law, the parties did not agree in their bargaining agreement to submit the dispute to arbitration. The court agreed that since the contract was silent about BOCES' participation in programs or the district's authority or lack thereof to subcontract in general, the disagreement was not subject to arbitration.

At issue in another case from New York was the arbitrability of a district's hiring of two uncertified applicants as interscholastic coaches when two certified staff members had applied for the positions. Applying the two-part *Liverpool* inquiry, an appellate court affirmed that the dispute was subject to arbitration because the complaint alleged that the district erred by failing to follow negotiated procedures for hiring, and the bargaining agreement included a broad arbitration clause.[26] The appellate panel ascertained that the trial court properly denied the district's motion for a stay of arbitration.

A union unsuccessfully sought arbitration over two teachers' requests to use a sick-leave bank for extended post-pregnancy leaves. An appellate court in New York affirmed that the matter was not subject to arbitration.[27] The court indicated out that when the board and union clashed over the sick leave bank, consistent with the terms of their bargaining agreement, they submitted the issue to a physician, who determined that the requests did not stem from "serious illness or injury" as required by the provision. Consequently, the court observed that the use of this contractually specified tie-breaking procedure rendered the matter non-arbitrable.

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[24] Matter of Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Fed'n of Teachers Local 1532, 697 N.Y.S.2d 695 [139 Educ. L. Rep. 590] (N.Y. App. Div. 1999).

[25] Newfield Cent. Sch. Dist. v. Newfield Cent. Sch. Teachers Ass'n, 686 N.Y.S.2d 125 [133 Educ. L. Rep. 567] (N.Y. App. Div. 1999).

[26] In re Van Scoy (Holder) 695 N.Y.S.2d 834 [138 Educ. L. Rep. 485] (N.Y. App. Div. 1999).

[27] Pocantico Hills Cent. Sch. Dist. v. Pocantico Hills Teachers Ass'n, 694 N.Y.S.2d 417 [137 Educ. L. Rep. 759](N.Y. App. Div. 1999).

In the final case from New York dealing with arbitration, an appellate court explained that a teacher did not have to exhaust the grievance procedures in his bargaining agreement before filing suit alleging a violation of his statutory rights under state education laws.[28] The court offered that the teacher's complaint, which stemmed from a reduction in his annual salary, did not relate to any of the terms and conditions of the bargaining agreement.

The Supreme Court of New Hampshire settled a dispute over the arbitrability of a principal's evaluation of a teacher and the superintendent's related letter informing the instructor of the need to improve if she desired a recommendation for contract renewal beyond the following school year. The union claimed that both administrators engaged in disciplinary actions that were unfounded by just cause in contravention of the bargaining agreement. After the New Hampshire Public Employee Labor Relations Board agreed with the union, the district appealed. The court reasoned that the principal's actions did not constitute disciplinary action as the principal did not have the authority to fire her.[29] Conversely, the court was of the view that since the superintendent had the statutory authority to nominate, hire, or fire teachers, his letter could be viewed as disciplinary and was therefore grievable and arbitrable.

Teachers in Indiana sued their union for a breach of duty of fair representation and their school board for breach of contract. The teachers complained that a newly bargained contract provision substantially reduced the benefits of individuals who retired in 1998. When a trial court dismissed the case for failure to exhaust administrative remedies, the teachers sought further review. An appellate court reversed on the basis that breach of the duty of fair representation did not constitute an unfair practice as defined by the controlling state statute.[30] Similarly, the court maintained that the teachers' breach of contract claim against the board was outside of the jurisdiction of the Indiana Education Employment Relations Board.

In Illinois, a teacher sued his school board and fellow teachers for defamation, civil conspiracy, and tortious interference with contractual relations. The teacher resigned his first grade teaching position after other teachers made allegedly slanderous statements, accusing him of inappropriately touching female students. However, the teacher was eventually re-hired as a physical education teacher. A federal trial court rejected the defendants' motions to dismiss.[31] The court also rejected the board's claim that the teacher should have exhausted grievance procedures under his bargaining agreement before bringing suit. The court wrote that since the reassignment provisions of the contract were inapplicable insofar as the teacher was rehired following a resignation, he did not have to file a grievance and exhaust administrative remedies.

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[28] Marino v. Board of Educ. of the Hauppauge Union Free Sch. Dist., 691 N.Y.S.2d 537 [136 Educ. L. Rep. 527] (N.Y. App. Div. 1999).
[29] Appeal of Lincoln-Woodstock Coop. Sch. Dist., 731 A.2d 992 (N.H. 1999).
[30] Fratus v. Marion Community Schs. Bd. of Trustees, 721 N.E.2d 280 [140 Educ. L. Rep. 350] (Ind. Ct. App. 1999).

A teacher sued her school board, principal, and assistant principal for breach of contract, intentional infliction of emotional distress, and tortious interference with a contract, alleging that the two administrators subjected her to embarrassing public comments, questioning her mental fitness to teach. The district then required her to submit to two psychological examinations and placed her on an indefinite leave of absence, even though both tests revealed that she was fit to return to the classroom. After a series of negotiations with the district in which the teacher was represented by counsel for the Connecticut Education Association, the teacher signed a letter of resignation effective at the end of the 1995-96 school year and was assigned to complete the year as a curriculum assistant. A trial court granted the defendants' motions for summary judgment. On further review, an appellate court affirmed that since the teacher's resignation was voluntary and she failed to plead a claim of constructive discharge, the motion for summary judgment was appropriate.[32] At the same time, the court reversed and reinstated the teacher's other claims, since genuine issues of fact precluded a grant of summary judgment in favor of the district and administrators.

Procedural Issues

In Pennsylvania, an appellate refused to hear a school district's challenge of an order directing it to comply with an arbitration award.[33] The appellate panel dictated that since the trial court required the board to negotiate an additional term in the collective bargaining agreement for a period of sixty days and to return to the arbitrator if an agreement could not be reached, the order was neither final nor appealable.

When a teacher who faced the non-renewal of her contract requested a hearing pursuant to her collective bargaining agreement, she named two of the five persons to serve on the termination hearing panel. However, the school board refused to honor the teacher's selection since neither was one of its employees. The board argued that since it adopted the pertinent master contract provision as policy, it alone had the authority to interpret the policy. As such, board interpreted the phrase, "two persons chosen by the educator" as meaning two district employees. The Supreme Court of Utah rejected this logic.[34] The court ruled that sustaining the board's action would have amounted to granting it the unilateral authority to alter prior-negotiated provisions of the contract. Instead, the court contended that the since the plain meaning of the bargaining agreement had to be honored, the case had to be remanded for a grant of summary judgment in favor of the teacher.

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[31] Bogosian v. Board of Educ. of Community Unit Sch. Dist. 200, 73 F. Supp.2d 949 [140 Educ. L. Rep. 600] (N.D. Ill. 1999).
[32] Appleton v. Board of Educ. of the Town of Stonington, 730 A.2d 88 [135 Educ. L. Rep. 170] (Conn. Ct. App. 1999).
[33] Central Dauphin Sch. Dist. v. Central Dauphin Educ. Ass'n, 739 A.2d 1164 (Pa. Commw. Ct. 1999).

Judicial Review

Eleven cases involved judicial appeals of arbitration awards. Six cases implicated salary and benefits, three concerned challenges to employee dismissals and nonrenewals, and two involved objections to reduction in forced cuts made by the district. Courts upheld administrative rulings in whole or part in six of the cases.

Salary and Benefits

A school board in New York challenged an arbitration award that granted a teacher vacation, holiday, and sick pay from October 1991 until the time of the complaint on March 2, 1994. The board argued that the order exceeded the authority of the arbitration panel since the collective bargaining agreement contained a provision that required any grievance to be filed within seventy-five days of an alleged contractual violation. In agreeing with the board, an appellate court modified the order so that the teacher was only entitled to relief from a point in time seventy-five days prior to the filing of his complaint.[35]

Another appellate court in New York affirmed that a guidance counselor could proceed with her complaint against her district for compensation for working more than twenty days beyond the work year defined in her collective bargaining agreement.[36] Pursuant to its motion for summary judgment, the court acknowledged that the district failed to establish that the counselor, as a matter of law, was not entitled to the disputed compensation. Even so, the court rejected the counselor's claim for punitive damages. The court noted that the board's allegedly "willful, intentional, and malicious" refusal to abide by the contract was insufficient to support her claim for punitive damages.

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[34] Board of Educ. of Alpine Sch. Dist. v. Ward, 974 P.2d 824 [133 Educ. L. Rep. 1049] (Utah 1999).

[35] Hill v. Chancellor of the Bd. of Educ. of the City Sch. Dist. of N.Y., 684 N.Y.S.2d 592 [132 Educ. L. Rep. 878] (N.Y. App. Div. 1999).

[36] Wanner v. Corning-Painted Post Rea Sch. Dist., 686 N.Y.S.2d 247 (N.Y. App. Div. 1999).

When a union of school administrators in Pennsilvania could not come to terms with their district, the parties entered into interest arbitration. A three-person arbitration panel issued a final order including a collective bargaining agreement, even though the arbitrator appointed by the association dissented on more than thirty items. The association appealed, arguing that the arbitrators exceeded the scope of their authority by resolving matters not submitted in the original complaint. A trial court refused to hear a challenge based on a provision in the state statute on arbitration panel awards, which maintains that such awards are not subject to judicial review. On further review, an appellate court affirmed that despite the statutory language, arbitration awards may be appealed only on limited issues regarding the jurisdiction of the arbitrators; the regularity of the proceedings; an excess of the arbitrator's powers; and deprivation of constitutional rights.[37] As to the merits of the case, the court rejected the association's claim in noting that each issue addressed by the resulting collective bargaining agreement was properly before the panel in the evidentiary portion of the hearing.

In a second case from Pennsylvania, a teachers union prevailed in its quest to have an arbitration award vacated over placement of teachers with non-continuous records of service to the district. The union argued that teachers should have received credit for all of the years that they worked in the district, regardless of whether there was a break in service. The district only recognized continuous years of service, beginning with the point of rehire. The Supreme Court of Pennsylvania, in applying the "essence test," held that the arbitration order in favor of the district was erroneous.[38] The court based its judgment on the fact that state law expressly requires that no collective bargaining agreement can conflict with or waive statutory provisions. The court used other provisions of the code to support its requirement that the district recognize all of the years of each teacher's service to it, even if they were non-continuous.

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[37] Commonwealth Ass'n of Sch. Admin. v. Board of Educ., Sch. Dist. of Philadelphia, 740 A.2d 1255 [140 Educ. L. Rep. 296] (Pa. Commw. Ct. 1999).

[38] Mifflinburg Area Educ. Ass'n, Ulrich v. Mifflinburg Area Sch. Dist., 724 A.2d 339 [132 Educ. L. Rep. 507] (Pa. 1999).

When a school district in New Jersey successfully convinced a trial court to vacate an arbitration award in a grievance involving placement of teachers on a negotiated salary schedule, the union appealed. The arbitrator decreed that the district breached the contract and ordered it to review the records of all affected teachers, to appropriately place them on the schedule with full credit for years taught at accredited schools, provide back-pay where applicable, and properly place any future hires. However, the arbitrator did not consider the fiscal impact of the order. This fact and the lack of specificity regarding individual teachers motivated the trial court to vacate the order in its entirety as fatally imperfect. On further review, an appellate court reversed, finding that while the arbitrator could and should examine the fiscal impact of the remedy, the conclusion that the district breached the contract should have stood and should have been remanded for full and proper consideration of the remedy in light of the public interests involved.[39]

A school board challenged the confirmation of an arbitration award that it violated its operative bargaining agreement by denying health insurance coverage for retirees aged sixty-five who had dependent children aged twenty-six or less. The Supreme Court of Rhode Island vacated the award because it was entered pursuant to a collective bargaining agreement that had been declared void and unenforceable by previous litigation.[40]

Dismissal and Nonrenewal

An appellate court in Illinois interpreted state statutes as vesting school boards with an exclusive authority to dismiss teachers.[41] As such, the court struck down an order of the IELRB directing a board to reinstate a substitute teacher who had been dismissed. Further, the court declared that that the authority to employ, discharge, and layoff could not be delegated to an arbitrator through a collective bargaining agreement. The court posited that the power in question was one of a number of changes to the school code enacted by the legislature in order to grant more authority to the Chicago School Reform Board of Trustees to facilitate successful school reform.

Pursuant to state law, a teacher in New York challenged an arbitration award that upheld her dismissal. An appellate court dismissed the teacher's motion to vacate the award because she was neither a party to the collective bargaining agreement nor to the arbitration.[42] The court commented that the teacher lacked standing to bring her appeal before it as an individual.

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[39] South Plainfield Bd. of Educ. v. South Plainfield Educ. Ass'n, 727 A.2d 71 [133 Educ. L. Rep. 964] (N.J. Super. Ct. App. Div. 1999).

[40] Providence Teachers Union v. Providence Sch. Bd., 725 A.2d 282 [132 Educ. L. Rep. 857] (R.I. 1999).

[41] Chicago Sch. Reform Bd. of Trustees v. Illinois Educ. Labor Relations Bd., 721 N.E.2d 676 (Ill. App. Ct. 1999).

A school district appealed an adjudication of the PELRB that it committed an unfair labor practice in refusing to allow a home economics teacher to add health classes to her schedule in order to maintain a full-time job. The Supreme Court of New Hampshire affirmed that the PELRB's reading of the contract provision giving teachers a reasonable expectation of continued employment was not clearly erroneous.[43] The court also asserted that the teacher had previously taught health for the district although uncertified in that subject area, and that since the health classes would have constituted less than 50% of her job, certification was not required. In addition, the court affirmed the PELRB's rationale that the district erred by denying the teacher the health education classes on the basis that she was not certified and then hiring a replacement who was similarly uncertified, especially since it rejected her offer to work toward certification. However, the court vacated the portion of the PELRB's order reinstating the teacher to that position since the district had hired a fully certified teacher in the interim. The court remanded the case for consideration of a proper remedy.

Reduction-In-Force

A union of custodial workers challenged a school district's decision to subcontract for custodial work during the terms of their collective bargaining agreement. The district, citing budgetary concerns, laid off all eleven employees. At the district's recommendation, the subcontractor hired three of the laid off workers. No positions were eliminated by this move and there was no dispute that the subcontracted workers performed the same jobs as those who had been laid off. On hearing the evidence, the PELRB was convinced that the district committed an unfair labor practice. The Supreme Court of New Hampshire agreed that since the bargaining agreement had not expired, the district could not claim management prerogative as justification for its actions.[44] Rather, the court was of the opinion that insofar as the decision to subcontract was negotiable, the district's unilateral termination of its relationship with the bargaining unit was an unfair labor practice.

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[42] Wilson v. Board of Educ. of the City of N.Y., 689 N.Y.S.2d 222 [135 Educ. L. Rep. 216](N.Y. App. Div. 1999).

[43] Appeal of Lisbon Reg'l Sch. Dist., 727 A.2d 974 [134 Educ. L. Rep. 216] (N.H. 1999).

[44] Appeal of Hillsboro-Deering Sch. Dist., 737 A.2d 1098 [138 Educ. L. Rep. 447] (N.H. 1999).

In New York, a similar issue arose regarding a school district's reduction of a groundskeeper's position from full-time to part-time. An arbitrator indicated that the district violated the bargaining agreement by failing to bargain the reduction. After a trial court vacated the award, the union sought further review. An appellate court reinstated the arbitration award in reasoning that since the master contract listed the position as a year-round, full-time position and the parties agreed to arbitrate disputes related to any provision of the contract, any unilateral management rights claimed by the district were effectively waived by the negotiated agreement.[45]

Strikes

When a teachers union engaged in an illegal strike in contravention of a cease and desist order, it was found in contempt and ordered to pay $20,000 for each day that the work stoppage continued. Once the strike was resolved, the court calculated that the union owed $60,000 in contempt fines. The union challenged the imposition of the fines on two grounds: first, that since the fines were punitive, criminal procedural protections were required; and second, that the court improperly considered the local union's assets when calculating the amount of the daily fine. An appellate court explained that the fines, while burdensome, were of an insufficient amount to characterize them as punitive, thereby attaching criminal procedural protections.[46] Rather, the court pointed out that the fines were civil penalties that were properly designed to coerce the union to comply with the earlier directive. However, the court agreed with the union that the trial judge failed to apply the correct standards for computing a prospective contempt fine and so remanded for reconsideration of this issue.

Miscellaneous

In the first of four cases that did not fit any of the topical categories, a federal trial court in New York permitted a breach of contract claim against a school board to proceed.[47] The contractor, a transportation company, argued that the board's actions with respect to a labor dispute interfered with its ability to fulfill their contract. The court agreed that the board appeared to have breached its duty of good faith and fair dealing. The court stated that the contract language was nebulous regarding fingerprinting as a precondition for employment, and that if such a requirement did exist, the board waived it by conditionally certifying workers. The court added that to continue to certify workers conditionally or to consider any compromise with the company demonstrated a lack of good faith.

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[45] In Re Hammondsport Cent. Sch. Dist. (Hammondsport Non-Teaching Personnel Org.), 689N.Y.S.2d 822 [135 Educ. L. Rep. 585] (N.Y. App. Div. 1999).

[46] Labor Relations Comm'n v. Salem Teachers Union, Local 1258, 706 N.E.2d 1146 [132 Educ. L. Rep. 903 (Mass. App. Ct. 1999).

[47] Van-Go Transport Co. v. New York City Bd. of Educ., 53 F. Supp.2d 278 [136 Educ. L. Rep. 880] (E.D. N.Y. 1999). *See* note 4 supra for the court's disposition of the federal claims.

In one of a series of lawsuits filed by an informal group of retired teachers, an appellate court in New York affirmed that the teachers could sue their board directly for failing to implement a contract with their federation.[48] The court also permitted the direct action to proceed because the retired teachers also complained that the union breached its duty of fair representation. In light of the interdependence of these two claims, the panel agreed that the trial court properly consolidated this action with another filed by the plaintiffs against the teachers union.[49] Further, the court observed that the earlier suits did not estop the teachers' alliance from bringing their breach of contract claim, as the previous legal actions only considered their failure to negotiate in good faith claim.

Another court in New York court heard arguments from a food service worker who wished to rescind her resignation. Pursuant to its authority under state law, the board of education refused to rescind the worker's resignation. After a trial court agreed with the district, an appellate court affirmed that it lacked the justification to overturn the board's decision.[50] Further, the court was satisfied that the delivery of a letter to a school clerk was the equivalent of delivery to the board itself. Finally, the panel affirmed that the trial court properly referred the worker's claims of harassment and constructive discharge to the Public Employment Relations Board.

When the Minnesota legislature added a last minute provision to its omnibus tax relief bill requiring school districts to comply with the state's prevailing wage act for all construction projects in excess of $100,000, a board and its contractor sued the governor and state commissioners. The plaintiffs obtained a declaratory judgment that the provision either did not apply or that, alternatively, it was unconstitutional. After first maintaining that the plaintiffs had standing to bring suit, an appellate court affirmed that the provision applied to a high school construction project undertaken by the board.[51] At the same time, the court was of the view that the provision violated the state constitutional requirement that bills address a single subject under an appropriate title. Here, the provision did not address tax reform or tax relief, the stated subject of the bill. Further, the court contended that the note in the title put the public or legislators on notice that it contained a provision expanding the applicability of the prevailing wage act. Finally, the court ruled that the offending provision was severable from the remainder of the bill.

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[48] Buffalo Retired Teachers 91-94 Alliance v. Board of Educ. for City Sch. Dist. of City of Buffalo, 689 N.Y.S.2d 562 [135 Educ. L. Rep. 235] (N.Y. App. Div. 1999).

[49] Buffalo Retired Teachers 91-94 Alliance v. Buffalo Teachers Fed'n., 672 N.Y.S.2d 1021 (N.Y. App. Div. 1998).

[50] Grogan v. Holland Patent Cent. Sch. Dist., 693 N.Y.S.2d 792 [137 Educ. L. Rep. 334] (N.Y. App. Div. 1999).

Conclusion

As these cases demonstrate, courts continue to play a considerable role in defining the relationship between schools and their unions and between unions and their members. The total number of cases in 1999 was slightly less than the previous year's. And, although the United States Supreme Court did not set any national precedents this year, state supreme courts did so in ten cases. How the application of these precedents figures into future disputes and whether other decisions reported here survive further appeals will likely be reflected in future Yearbook chapters.

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[51] Associated Builders and Contractors v. Carlson, 590 N.W.2d 130 [133 Educ. L. Rep. 243] (Minn. Ct. App. 1999).

5

STUDENTS WITH DISABILITIES

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Introduction

Litigation over the rights of students with disabilities certainly did not subside in 1999. As in the past, much of the litigation in 1999 involved procedural issues and contested placement decisions under the Individuals with Disabilities Education Act (IDEA).[1] Many cases dealt with procedural and dispute resolution issues, while in others courts were asked to determine whether school districts offered a student a free appropriate public education (FAPE). In rendering its second opinion on the IDEA's related services mandate, the Supreme Court ruled that a district was required to pay for round-the-clock nursing services for a severely disabled student.[2]

As in past years, suits have been filed on behalf of students with disabilities under section 504 of the Rehabilitation Act[3] and the Americans with Disabilities Act (ADA)[4] as well as the IDEA. In most of these cases, parties alleged that students were subjected to discriminatory treatment on the basis of a disability.

Entitlement to Services

The IDEA requires school districts to provide students who have disabilities with a FAPE consisting of any needed special education and related services.[5] However, the IDEA does not establish any substantive standards by which those services can be judged to be adequate. The IDEA provides that a student is to be afforded specially designed instruction[6] in conformance with his or her Individualized Education Program (IEP).[7] In *Board of Education of Hendrick Hudson Central School District v. Rowley*,[8] the Supreme Court held that a student with disabilities is entitled to personalized instruction with support services sufficient to permit the child to benefit from the education provided. *Rowley* also cautioned lower courts not to impose their views of preferable educational methods on school districts;

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[1] 20 U.S.C. § 1400 *et seq.*

[2] Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66, 119 S.[132 Educ. L. Rep. 40] (1999).

[3] 29 U.S.C. § 794.

[4] 42 U.S.C. §§ 12101 - 12213.

[5] 20 U.S.C. §§ 1401(8) and 1412(a)(1)A).

[6] 20 U.S.C. § 1401(25).

[7] 20 U.S.C. §§ 1401(11) and 1414(d).

[8] 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

however, frequently the courts are asked to determine what level of services is required to meet the IDEA's minimum standards. Students attending private schools also are entitled to some benefits of the IDEA.[9]

Although the 1997 IDEA amendments made it clear that school districts may, but are not required to, provide on-site services to students voluntarily attending private schools,[10] courts were still dealing with this issue in 1999. In a pre-amendment lawsuit, the Eighth Circuit asserted that a parochial school student had been entitled to receive special education services on the premises of his private school in the years before the 1997 amendments took effect.[11] On remand, a federal trial court in Minnesota declared that the district's failure to provide on-site special education services denied the student a free appropriate public education.[12] Since the student had been denied his rights for six years, the court awarded six years of compensatory educational services. On the other hand, in a post-amendment lawsuit, the Ninth Circuit found that the IDEA did not require the provision of on-site services for a student in Oregon.[13]

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the Act's mandates.[14] The Act states that the parents or guardian of a child with disabilities must be provided with the opportunity to participate in the development of the IEP for and placement of their child.[15] The IDEA also requires school districts to provide written notice and obtain parental consent prior to evaluating a child[16] or making initial placements.[17] Once a student has been placed in special education, a school district must provide parents with proper notice before initiating a change in placement.[18] Once placed, a student's situation must be reviewed at least annually[19] and the placement must be reevaluated at least every three years.[20]

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[9] 20 U.S.C. § 1412(a)(10)(A)(i).

[10] 20 U.S.C. § 1412(a)(10)(A)(i)(II).

[11] Peter v. Wedl, 155 F.3d 992 [129 Educ. L. Rep. 594] (8th Cir. 1998).

[12] Westendorp v. Independent Sch. Dist. No. 273, 35 F. Supp.2d 1134 [133 Educ. L. Rep. 97] (D. Minn. 1998).

[13] KDM *ex rel.* WJM v. Reedsport Sch. Dist., 196 F.3d 1046 [139 Educ. L. Rep. 884] (9th Cir. 1999).

[14] 20 U.S.C. § 1415.

[15] 20 U.S.C. §§ 1414(d)(1)(B)(i) and 1414(f).

[16] 20 U.S.C. § 1414(a)(1)(C).

[17] 20 U.S.C. § 1415(b)(3).

[18] 20 U.S.C. § 1415(b)(3)(A).

[19] 20 U.S.C. § 1414(d)(4)(A).

[20] 20 U.S.C. § 1414(a)(2)(A).

Under the IDEA, parents of a student with disabilities may be entitled to an independent evaluation at public expense if they disagree with the school district's evaluation.[21] However, a district may challenge a request for an independent evaluation in an administrative hearing and if the district's evaluation is accepted as appropriate, the parents are not entitled to an independent evaluation at public expense.[22] The IDEA stipulates that an IEP must contain statements of a student's current educational performance, annual goals and short term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met.[23] The IEP must also include statements concerning how the student's disability affects the ability to be involved in and progress in the general educational curriculum along with statements regarding any modifications that may be needed to allow the child to participate in the general curriculum.

Evaluation and Classification

In a case from Pennsylvania, the Third Circuit affirmed an award of reimbursement for an independent evaluation.[24] The court commented that the parents' failure to disagree with the district's evaluation before obtaining it did not foreclose reimbursement.

Rights of Parents or Guardians

The importance of keeping procedural notices up-to-date was highlighted in a case from Maryland where the trial court ruled that a district violated the IDEA by failing to properly inform parents of their rights regarding tuition reimbursement.[25] The district gave the parents a procedural safeguards booklet, but it was outdated and did not reflect recent changes in federal and state laws. According to the court, the fact that the parents' attorney was aware of the changes did not mean that the district did not have to fulfill its duty to inform the parents of their rights.

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[21] 20 U.S.C. § 1415(b)(1).

[22] 34 C.F.R. § 300.502(b).

[23] 20 U.S.C. § 1414(d)(1)(A).

[24] Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 [138 Educ. L. Rep. 91] (3d Cir. 1999).

[25] Carnwath v. Board of Educ. of Anne Arundel County, 33 F. Supp.2d 431 [132 Educ. L. Rep. 433] (D. Md. 1998).

Development of Individualized Education Programs

In a suit where parents charged that a school district had not ensured their participation in the decision-making process regarding their child's IEP, the federal court in New Jersey noted precisely the opposite.[26] The court contended that since the record demonstrated that the parents had been extensively involved in the development of the IEP, the district did not violate the IDEA's procedural requirements.

Change in Placement

The federal trial court in Maryland decreed that an administrative decision that placed a student in a private school did not create a permanent, stay put placement because it expressly maintained that it did not consider whether the private school was the appropriate placement for subsequent years.[27] Even though the student continued to attend the school at public expense for several more years, the court believed that it was not his educational placement for stay put purposes since the district had made it emphatically known that it did not agree that the private school was the stay put placement.

Dispute Resolution

If parents disagree with any of a school district's decisions regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.[28] Any party not satisfied with the final outcome of administrative proceedings may appeal to the state or federal courts;[29] however, all administrative remedies must be exhausted prior to resort to the courts unless it is futile to do so. While an administrative or judicial action is pending, a school district may not change the student's placement without parental consent,[30] a hearing officer's order,[31] or a court order.[32]

The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[33] However, in *Rowley*, the Supreme Court cautioned judges not to substitute their views of proper educational methodology for that of competent school authorities. The IDEA does not contain a statute of limitations for filing a lawsuit; therefore, courts must borrow one from analogous state statutes.

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[26] T.R. and E.M.R. v. Kingwood Township Bd. of Educ., 32 F. Supp.2d 720 [132 Educ. L. Rep. 337] (D. N.J. 1998).

[27] Mayo v. Baltimore City Pub. Schs., 40 F. Supp.2d 331 [134 Educ. L. Rep. 162] (D. Md. 1999).

[28] 20 U.S.C. §§ 1415(f),(g).

[29] 20 U.S.C. § 1415(i)(2)(B).

[30] 20 U.S.C. § 1415(j).

[31] 20 U.S.C. § 1415(k)(2).

[32] Honig v. Doe, 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

In 1997, Congress amended the IDEA to insert language that provided for the resolution of disputes through a mediation process as an alternative to an adversarial proceeding.[34] Even so, mediation is voluntary and may not be used to deny or delay the parent's right to a hearing.

The IDEA is not the exclusive avenue through which parents may enforce the rights of children with disabilities. The IDEA specifically stipulates than none of its provisions can be interpreted to restrict or limit the rights, procedures, and remedies available under the Constitution, section 504, or other federal statutes protecting the rights of students with disabilities.[35] Lawsuits are frequently filed under section 504, the ADA, and section 1983 of the Civil Rights Act of 1871[36] in addition to the IDEA.

Administrative Hearings

Several courts were asked to evaluate whether parents met the requirement of exhausting administrative remedies prior to seeking judicial review. In Florida, a federal trial court indicated that although parental desires for a quick resolution to their dispute with the school district was understandable, it did not obviate the need to exhaust administrative remedies.[37]

A federal trial court in Louisiana pointed out that it would not have been futile for parents seeking tuition reimbursement to exhaust administrative remedies because disagreements regarding appropriate education and questions of financial responsibility were subject to the administrative process.[38] Further, a federal trial court in Michigan twice held a lawsuit in abeyance pending exhaustion of administrative remedies.[39]

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[33] 20 U.S.C. § 1415(i)(2)(B).

[34] 20 U.S.C. § 1415(e).

[35] 20 U.S.C. § 1415(l).

[36] 42 U.S.C. § 1983.

[37] Radcliffe v. School Bd. of Hillsborough County, Fla., 38 F. Supp.2d 994 [133 Educ. L. Rep. 919] (M.D. Fla. 1999).

[38] Thomas v. East Baton Rouge Parish Sch. Bd., 29 F. Supp.2d 337 [131 Educ. L. Rep. 752] (M.D. La. 1998).

[39] Kuszewski v. Chippewa Valley Schs., 51 F. Supp.2d 812 [136 Educ. L. Rep. 818] (E.D. Mich. 1999).

In an interesting case, parents from Indiana appealed a hearing officer's adverse decision to a state review panel. When their appeal was dismissed as untimely, they initiated judicial review of the hearing officer's action. A federal trial dismissed the suit on the ground that the parents failed to exhaust their administrative remedies.[40] The court reasoned that the parents failed to pursue available administrative remedies when they neglected to appeal the hearing officer's decision in a timely fashion.

A district court in New York remarked that parents whose two requests for a due process hearing were ignored were excused from exhausting administrative remedies.[41] The court judged that the school district had prevented the appropriate administrative remedies from taking place. In another case from New York, a district court acknowledged that it was not necessary for parents to exhaust administrative remedies when only legal questions were presented in their suit and a hearing officer could not grant adequate relief.[42] The federal trial court in Colorado also discerned that parents seeking damages were not required to exhaust further administrative remedies when the hearing officer denied their request for a hearing on the ground that he did not have the authority to grant any relief.[43]

In a case from Minnesota, the Eighth Circuit affirmed that a student did not have the right to a due process hearing against a school district where he no longer resided.[44] The court was convinced that when a student changes districts and does not request a due process hearing, his right to challenge prior educational services is not preserved.

The federal trial court in Maryland explained that the state's procedure for training administrative law judges complied with the IDEA because the statute does not impose any training requirements.[45] Accordingly, the court concluded that the training system comported with the IDEA's general guarantee of an impartial due process hearing.

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[40] L.M. v. Brownsburg Community Sch. Corp., 28 F. Supp.2d 1107 [131 Educ. L. Rep. 716] (S.D. Ind. 1998).

[41] Meehan v. Patchogue-Medford Sch. Dist., 29 F. Supp.2d 129 [131 Educ. L. Rep. 737] (E.D. N.Y. 1998).

[42] Connors v. Mills, 34 F. Supp.2d 795 [132 Educ. L. Rep. 767] (N.D.N.Y. 1998).

[43] Padilla v. School Dist. No. 1 in the City and County of Denver, Colo., 35 F. Supp.2d 1260 [133 Educ. L. Rep. 106] (D. Colo. 1999).

[44] Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 [137 Educ. L. Rep. 150] (8th Cir. 1999).

[45] Carnwath v. Board of Educ. of Anne Arundel County, 33 F. Supp.2d 431 [132 Educ. L. Rep. 433] (D. Md. 1998).

Court Proceedings

In a class action suit involving the District of Columbia, the federal trial court appointed a special master to assist in resolving individual requests for immediate relief.[46] The court observed that District officials were unresponsive to the plaintiffs insofar as they failed to provide services, return telephone calls, and meet judicially imposed deadlines.

The Sixth Circuit was of the view that a federal trial court in Tennessee improperly admitted evidence that arose after an administrative law judge issued a decision in a dispute of the proper placement for the student.[47] As the case was winding its way through administrative appeals and awaiting trial, the student remained in his status quo placement. The appellate panel wrote that the trial court exceeded its authority in admitting evidence that arose during this time period, even though the contested IEP had expired.

Standing to Sue

A federal trial court in Virginia offered that the parents of a student with disabilities had standing to bring claims against their school district even though the claims alleged violations of the student's rights.[48] The court recognized that the parents had standing since they were also protecting their own rights to be compensated for funds they expended due to the district's failure to meet their child's needs.

Statute of Limitations

The Fourth Circuit affirmed that Virginia's general one-year statute of limitations for personal actions applied to parental requests for a due process hearing.[49] Favorably citing that case, a federal trial court asserted that Virginia's two-year statute of limitations for personal actions should be borrowed for appeals of administrative decisions under the IDEA.[50] The reason for the discrepancy in the limitations period between the two cases is that

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[46] Blackman v. District of Columbia, 185 F.R.D. 4 [134 Educ. L. Rep. 188] (D. D.C. 1999).

[47] Metropolitan Bd. of Educ. v. Guest, 193 F.3d 457 [139 Educ. L. Rep. 81] (6th Cir. 1999).

[48] Bernard v. School Bd. of the City of Norfolk, 58 F. Supp.2d 669 [138 Educ. L. Rep. 226] (E.D. Va. 1999).

[49] Manning v. Fairfax County Sch. Bd., 176 F.3d 235 [135 Educ. L. Rep. 38] (4th Cir. 1999).

[50] Bernard v. School Bd. of the City of Norfolk, 58 F. Supp.2d 669 [138 Educ. L. Rep. 226] (E.D. Va. 1999).

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the latter action accrued after July 1, 1995, while the former accrued before that date and the statute in question provides for a two-year limitations period for actions accruing after July 1, 1995.[51]

In Maryland, the federal trial court determined that the state's 180-day statute of limitations for appeals to administrative decisions should be applied in a suit to recover attorney fees under the IDEA.[52] The court found that an action for attorney fees was ancillary to the underlying dispute.

A federal district court in Michigan, in a case seeking compensatory educational services, observed that state tolling statutes may be applied in disputes over educational services owed to the severely mentally retarded under the IDEA.[53] Also, the federal trial court in Utah was of the opinion that equitable tolling applied when a school district failed to provide parents with any notice of the statute of limitations applicable to their claims.[54]

Actions Under Other Statutes

The federal trial court in Utah ruled that the IDEA permits parents to bring an enforcement action under section 1983.[55] The parents sought damages based on their claim that their son had not received a FAPE and had been denied due process protections.

Placement

The IDEA regulations require school districts to ensure that a "continuum of alternative placements" exists to meet the needs of students with disabilities for special education and related services.[56] The continuum must range from placement in general education to a private residential facility and must also include homebound services. However, the placement chosen for any given student must be in the least restrictive environment (LRE) for that child with removal from general education permissible only to the extent necessary to provide special education and related services.[57] All placements must be made at public expense and must meet state educational standards.[58] Each placement must be reviewed at least annually and revised if necessary.[59] In *Rowley*, the Supreme Court held that an appropriate education is one that is developed in compliance with the IDEA's procedures and is reasonably calculated to enable a child to receive educational benefits. Although states must adopt policies and procedures that are consistent with the IDEA, they may provide greater benefits than those required by the federal law. If a state does establish higher standards, courts will consider those standards when evaluating the appropriateness of an IEP.[60]

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[51] Va. Code 1950 § 8.01-248.

[52] Mayo v. Booker, 56 F. Supp.2d 597 [137 Educ. L. Rep. 672] (D. Md. 1999).

[53] Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp.2d 807 [137 Educ. L. Rep. 676] (E.D. Mich. 1999).

[54] L.C. and K.C. v. Utah State Bd. of Educ., 57 F. Supp.2d 1214 [138 Educ. L. Rep. 198] (D. Utah 1999).

[55] L.C. and K.C. v. Utah State Bd. of Educ., 57 F. Supp.2d 1214 [138 Educ. L. Rep. 198] (D. Utah 1999).

[56] 34 C.F.R. § 300.551.

[57] 20 U.S.C. § 1412(a)(5).

Appropriate Educational Placement

In New Jersey, the federal trial court ascertained that a proposed IEP for a preschool student provided more than trivial educational benefit to him since the program was supported by on-site therapists who would provide the services that he required.[61] A state appellate court in Florida declared that a student with autism had progressed under the school district's IEP and had received educational benefit from it.[62] As such, the court overturned an administrative law judge's order directing the district to provide an additional fifteen hours of one-on-one therapy.

The federal trial court in Maryland approved a proposed IEP calling for seven-and-one-half of special education services per week and curricular modifications for a student who is dyslexic.[63] The court decreed that the parents had not seriously called into question an administrative law judge's determination that the IEP would have provided the student with educational benefit. Similarly, the federal trial court in Connecticut upheld a hearing officer's finding that a proposed IEP was appropriate after noting that parents did not produce any evidence to show that the decision should have been reversed.[64]

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[58] 20 U.S.C. § 1401(8).

[59] 20 U.S.C. § 1414(d)(4).

[60] *See e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 [28 Educ. L. Rep. 70] (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 [27 Educ. L. Rep. 1093] (3d Cir. 1985).

[61] T.R. and E.M.R. v. Kingwood Township Bd. of Educ., 32 F. Supp.2d 720 [132 Educ. L. Rep. 337] (D. N.J. 1998).

[62] School Bd. of Martin County v. A.S., 727 So. 2d 1071 [133 Educ. L. Rep. 636] (Fla. Dist. Ct. App. 1999).

[63] Fritschle v. Andes, 45 F. Supp.2d 500 [135 Educ. L. Rep. 133] (D. Md. 1999)

[64] Mr. and Mrs. H. v. Region 14 Bd. of Educ., 46 F. Supp.2d 106 [135 Educ. L. Rep. 477] (D. Conn. 1999).

According to the federal trial court in Massachusetts, the fact that a student has not fully mastered a skill does not necessarily indicate that he or she failed to achieve progress in that area.[65] The parent had agreed that the IEP was appropriate but claimed that the district failed to implement certain aspects of the IEP. The parent's claims notwithstanding, the court was satisfied that the district properly implemented the student's IEP. A federal trial court in Texas commented that a district provided a student classified as seriously emotionally disturbed with an appropriate education since she did not have any educational needs that had not been met.[66] In Florida, a federal trial court agreed that an alternative school placement was appropriate for a student who had slashed another child's face with a box cutter.[67] The court was persuaded by evidence that the student's behavior improved while in the alternative school, and he earned passing grades in all his courses.

The Sixth Circuit affirmed that parents of an autistic child in Michigan were not entitled to prescribe or require a specific desired methodology.[68] Parents unsuccessfully sought to have their district implement a Lovass-type discrete trial training program in their home. Instead, the district placed the student in a special education program that included related services and some discrete trial training. The court was satisfied that school personnel had adequate background, experience, and training to evaluate the child and formulate a program to meet his needs. However, a district court in Illinois believed that a thirty-five to forty hour-per-week home-based Lovass program was reasonably calculated to enable an autistic student to receive educational benefit.[69] The court decided that the district's proposed placement in its early childhood program was not sufficiently individualized to ensure that the student would not regress.

A federal trial court in Wisconsin concluded that a district had not denied a student a FAPE because it had no reason to believe that he was disabled.[70] The student had been enrolled in the district only a short time, and district personnel had engaged in reasonable attempts at pre-referral intervention during that time. Further, the parents had not informed educators about problems that their son encountered in his previous school.

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[65] Ross v. Framingham Sch. Comm., 44 F. Supp.2d 104 [134 Educ. L. Rep. 935] (D. Mass. 1999).

[66] Sylvie M. v. Board of Educ. of Dripping Springs Indep. Sch. Dist., 48 F. Supp.2d 681 [136 Educ. L. Rep. 249] (W.D. Tex. 1999).

[67] Parent v. Osceola County Sch. Bd., 59 F. Supp.2d 1243 [138 Educ. L. Rep. 336] (M.D. Fla. 1999).

[68] Renner v. Board of Educ. of the Pub. Schs. of Ann Arbor, 185 F.3d 635 [137 Educ. L. Rep. 215] (6th Cir. 1999).

[69] T.H. v. Board of Educ. of Palatine Community Consol. Sch. Dist. 15, 55 F. Supp.2d 830 [137 Educ. L. Rep. 555] (N.D. Ill. 1999).

[70] Hoffman v. East Troy Community Sch. Dist., 38 F. Supp.2d 750 [133 Educ. L. Rep. 897] (E.D. Wis. 1999).

Least Restrictive Environment

The federal trial court in New Jersey approved a placement for a preschool student in a class that enrolled both disabled and nondisabled students.[71] The court was convinced that this placement was less restrictive than the private facility favored by the parents since it allowed considerable interaction between disabled and nondisabled students.

A federal trial court in Virginia stated that a special education placement with some mainstreaming was the LRE for a student who was diagnosed as mentally retarded.[72] The court explained that the full-time inclusion placement preferred by the parents would not meet the student's educational needs for core subjects given her significant cognitive limitations.

In Florida, a federal trial court posited that a student's inability to control his behavior made it impossible for him to obtain educational benefits in a public high school without posing a threat of injury to teachers and other children.[73] Thus, the court ordered the child to be placed in an alternative school as the LRE for the student.

Private Facilities

The Third Circuit vacated and remanded a judgment that distric officials in New Jersey formulated an appropiate IEP and that a student was not entitled to a private school placement.[74] The appellate panel was of the opinion that the trial court may not have given adequate consideration to the student's intellectual potential. The court reasoned that a student is not required to show that he cannot be educated in a public setting to be entitled to a private school placement, but rather, that he will not receive an appropriate education in the setting proposed by the district.

In Massachusetts, the federal trial court discerned that a student who required round-the-clock training required placement in a residential setting.[75] The court added that the fact that the student received psychiatric treatment did not transform the residential placement into something other than an educational placement.

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[71] T.R. and E.M.R. v. Kingwood Township Bd. of Educ., 32 F. Supp.2d 720 [132 Educ. L. Rep. 337] (D. N.J. 1998).

[72] Doe v. Arlington County Sch. Bd., 41 F. Supp.2d 599 [134 Educ. L. Rep. 848] (E.D. Va. 1999).

[73] Parent v. Osceola County Sch. Bd., 59 F. Supp.2d 1243 [138 Educ. L. Rep. 336] (M.D. Fla. 1999).

[74] Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 [133 Educ. L. Rep. 748] (3d Cir. 1999).

[75] Mohawk Trail Reg'l Sch. Dist. v. Shaun D., 35 F. Supp.2d 34 [132 Educ. L. Rep. 800] (D. Mass. 1999).

The federal trial court in Connecticut indicated that a student's success in the day component of a residential school during the summer conclusively established that he did not require a residential component to make educational progress.[76] The student was diagnosed as having attention deficit hyperactivity disorder and a central auditory processing disorder.

In an interesting case involving the costs of a residential placement, a state court in California contended that the IDEA prevented a county from securing reimbursement for future and past costs connected with care provided for a minor in a placement that was made pursuant to an IEP.[77] The child, who was a ward of the court, had been placed in a special education facility, but the county sought a child support order against his mother.

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if they are needed to assist the children to benefit from their special education programs.[78] The Act specifically mentions transportation and such developmental, supportive, and corrective services as speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, counseling services (including rehabilitation counseling), orientation and mobility services, medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[79] In *Irving Independent School District v. Tatro*,[80] the Supreme Court held that related services need to be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be incorporated into their IEPs. The only limitation on what can be considered a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes.

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[76] M.C. *ex rel.* Mrs. C. v. Voluntown Bd. of Educ., 56 F. Supp.2d 243 [137 Educ. L. Rep. 625] (D. Conn. 1999).

[77] County of Los Angeles v. Smith, 88 Cal. Rptr.2d 159 [136 Educ. L. Rep. 994] (Cal. Ct. App. 1999).

[78] 20 U.S.C. § 1401(a)(22).

[79] *Id.*

[80] 468 U.S. 883 [18 Educ. L. Rep. 138] (1984).

In *Cedar Rapids Community School District v. Garret F.*,[81] the Supreme Court found that a district in Iowa was required to provide full-time nursing services during school hours for a quadriplegic student whose spinal column had been severed in a motorcycle accident. The student required urinary bladder catheterization, suctioning of his tracheostomy, observation for respiratory distress, and other assistance but attended regular classes in a typical school program. Writing for the majority, Justice Stevens stated that the IDEA's related services definition encompassed these supportive services. Thus, the Court made it clear that the phrase medical services in the IDEA's related services provision does not embrace all forms of care that might loosely be described as medical in other contexts. Relying on *Cedar Rapids*, a state court in Michigan maintained that a district was required to provide nursing services during the school day to a student who was left a quadriplegic as a result of a bicycle accident.[82]

Stating that Congress did not intend to create a federal claim for every activity or type of conduct that may impede an individual's ability to take advantage of educational opportunities, a federal trial court in California was of the view that drug prevention is not a related service.[83] The parent claimed that the private special education school the student attended negligently or deliberately tolerated the use of illegal drugs on campus, and as a result, he had been provided with and ingested an illegal substance.

The federal trial court in Connecticut remarked that a student who had been diagnosed as having attention deficit hyperactivity disorder and a central auditory processing disorder, but who also suffered from depression, required counseling.[84] The court judged that there was a substantial connection between the student's depression and his lack of progress in school. The court ordered that the student be provided with counseling in order to receive educational benefits.

Remedies

If a school district fails to provide an appropriate placement for a student with disabilities, the courts are empowered to grant such relief as they determine to be appropriate.[85] The relief frequently involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their child. The Supreme Court has held that districts may be required to reimburse parents for costs incurred in providing their children with special education and related services if they prevail in having their chosen placement deemed appropriate.[86] In an amendment to the IDEA, earlier case law has been codified; however, reimbursement may be limited if parents did not provide a district with prior notice of their dissatisfaction with their child's placement and their intent to enroll him or her in a private school.[87] The Supreme Court has even permitted reimbursement if the parents' chosen facility is not state-approved, as long as it offers an otherwise appropriate education.[88] Awards of compensatory education services have been made in situations where the parents did not have the financial means to obtain private services while the litigation was pending.

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[81] 526 U.S. 66 [132 Educ. L. Rep. 40] (1999).

[82] Farmers Insurance Exchange v. South Lyon Community Schs., 602 N.W.2d 588 [139 Educ. L. Rep. 1043] (Mich. Ct. App. 1999).

[83] Armstrong by Steffensen v. Alicante Sch., 44 F. Supp.2d 1087 [135 Educ. L. Rep. 96] (E.D. Cal. 1999).

[84] M.C. *ex rel.* Mrs. C. v. Voluntown Bd. of Educ., 56 F. Supp.2d 243 [137 Educ. L. Rep. 625] (D. Conn. 1999).

[85] 20 U.S.C. § 1415(i)(2)(A).

In 1986, Congress adopted the Handicapped Children's Protection Act to allow parents who prevail in a lawsuit pursuant to the IDEA to recover their legal expenses.[89] In 1990, Congress passed legislation specifically abrogating the states' Eleventh Amendment immunity to lawsuits in the federal courts for any actions that occurred after October 30, 1990.[90] These amendments were passed in response to Supreme Court cases interpreting the original Act as not allowing for recovery of attorney fees by prevailing parents[91] and did not specifically abrogate states' sovereign immunity.[92]

Damages

A federal trial court in Colorado pointed out that damages are available under section 1983[93] for violations of the IDEA.[94] Here, parents of a student with disabilities filed suit seeking damages for the deprivation of their daughter's right to a FAPE. The court asserted that because the IDEA states that nothing in it should be construed to limit the rights, procedures, and remedies available under the Constitution or other federal laws,[95] and gives the courts the authority to grant such relief as they determine appropriate,[96] it follows that a court may order monetary damages. Further, the court could not uncover any clear indication in the statute or its legislative history that Congress intended to foreclose compensatory damages. Similarly, the federal trial court in Utah wrote that since the statutory language of the IDEA authorized it to award such relief that it considered appropriate, this provision gave it broad discretion.[97] Noting that there was no indication that Congress intended to limit the available remedies under the IDEA, the court observed that damages were an available remedy. In addition, a federal trial court in New York awarded damages under section 1983 for an IDEA violation.[98]

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[86] Burlington Sch. Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 [23 Educ. L. Rep. 1189] (1985).

[87] 20 U.S.C. § 1412(a)(10)(C)(ii).

[88] Florence County Sch. Dist. Four v. Carter, 510 U.S. 7(1993) [86 Educ. L. Rep. 41] (1993).

[89] 20 U.S.C. § 1415(i)(3)(B) *et seq.*

[90] 20 U.S.C. § 1403.

[91] Smith v. Robinson, 468 U.S. 992 [18 Educ. L. Rep. 148] (1984).

[92] Dellmuth v. Muth, 491 U.S. 223 [53 Educ. L. Rep. 792] (1989).

[93] 42 U.S.C. § 1983.

[94] Padilla v. School Dist. No. 1 in the City and County of Denver, Colo., 35 F. Supp.2d 1260 [133 Educ. L. Rep. 106] (D. Colo. 1999).

On the other hand, a district court in Michigan declared that the recovery of monetary, non-restitutional damages under the IDEA was disallowed by Sixth Circuit precedent.[99] The court acknowledged that damages under section 1983 are disallowed when they are not available in the first place under the IDEA. Offering that garden-variety violations of the IDEA cannot form the basis for a section 1983 action, the federal trial court in Massachusetts also denied damages when parents claimed that a school district intentionally denied their son a FAPE.[100] The court further reflected that the statute's clear implication is that it is to be reserved for cases where the alleged misconduct is constitutional in proportion, not merely statutory.

Tuition Reimbursement

The Seventh Circuit awarded tuition reimbursement to the parents of a three-year-old student in Illinois with Down Syndrome after determining that a school district's proposed IEP was not appropriate as it did not call for a placement in the least restrictive environment.[101] In a second case from

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[95] 20 U.S.C. § 1415(l).

[96] 20 U.S.C. § 1415(e)(2).

[97] L.C. and K.C. v. Utah State Bd. of Educ., 57 F. Supp.2d 1214 [138 Educ. L. Rep. 198] (D. Utah 1999).

[98] Cappillino v. Hyde Park Cent. Sch. Dist., 40 F. Supp.2d 513 [135 Educ. L. Rep. 44] (S.D.N.Y. 1999).

[99] Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp.2d 807 [137 Educ. L. Rep. 676] (E.D. Mich. 1999).

[100] Andrew S. *ex rel.* Margaret S. v. School Comm. of the Town of Greenfield, 59 F. Supp.2d 237 [138 Educ. L. Rep. 283] (D. Mass. 1999).

[101] Board of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Educ., 184 F.3d 912 [137 Educ. L. Rep. 157] (7th Cir. 1999).

Illinois, a federal trial court awarded reimbursement for the costs of a Lovass program for an autistic child since it was satisfied that this did not exceed the range of treatment levels recommended by experts.[102] The court rejected the district's proposed placement in its early childhood program as not being sufficiently individualized.

A federal trial court in Wisconsin commented that parents who had enrolled their son in a private residential school were not entitled to tuition reimbursement because the district had neither denied him a FAPE nor committed any procedural violations.[103] The federal trial court in Connecticut concluded that parents were not entitled to reimbursement for the residential component costs of a private placement since their son only needed a day school placement.[104]

In an interesting case from New York, a federal trial court ascertained that parents are not required to request a due process hearing to obtain reimbursement for a placement in a private school that is not on the state's approved list.[105] Here the district and parents agreed that the nonapproved facility could provide an appropriate education. The court decided that at that point the district was required to fund the placement if the parents could show that their financial situation precluded up-front tuition payments. The court added that all that is required for reimbursement is a payment demand letter.

The Third Circuit affirmed that when parents in Maryland unilaterally withdraw their children from public school without any mitigating circumstances, they are not entitled to reimbursement for private school tuition until they request review proceedings.[106] However, the federal trial court in Maryland decreed that parents who had not provided their district with written notice that they intended to reject the public placement and enroll their son in a private school as required by state law were still entitled to tuition reimbursement.[107] The parents were excused from this requirement because the district failed to give them notice of the procedural requirements mandated by state law and the IDEA.

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[102] T.H. v. Board of Educ. of Palatine Community Consol. Sch. Dist. 15, 55 F. Supp.2d 830 [137 Educ. L. Rep. 555] (N.D. Ill. 1999).

[103] Hoffman v. East Troy Community Sch. Dist., 38 F. Supp.2d 750 [133 Educ. L. Rep. 897] (E.D. Wis. 1999).

[104] M.C. *ex rel.* Mrs. C. v. Voluntown Bd. of Educ., 56 F. Supp.2d 243 [137 Educ. L. Rep. 625] (D. Conn. 1999).

[105] Connors v. Mills, 34 F. Supp.2d 795 [132 Educ. L. Rep. 767] (N.D.N.Y. 1998).

[106] Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 [138 Educ. L. Rep. 91] (3d Cir. 1999).

[107] Mayo v. Baltimore City Pub. Schs., 40 F. Supp.2d 331 [134 Educ. L. Rep. 162] (D. Md. 1999).

Compensatory Services

The Third Circuit partially affirmed that a student's right to compensatory education services accrues when a district knows or should know that a child is not receiving an appropriate education.[108] The court further indicated that the parents' failure to object to the student's placement does not deprive the child of his or her right to an appropriate education.

In a 1998 case, the Eighth Circuit posited that a district was required to provide special education services on the premises of a parochial school prior to the 1997 IDEA Amendments.[109] On remand, the federal trial court in Minnesota awarded the student six years of compensatory services as the remedy for the district's failure to provide on-site services.[110]

A federal trial court in Michigan was convinced that compensatory education was an appropriate remedy for a student who had been placed in a special education program for 180 days per year, in spite of a recommendation by the educational planning and placement team that he receive services for a minimum of 230 days per year.[111] The court thus confirmed an administrative hearing award of 250 days of compensatory educational services.

Attorney Fees

Many disputes over attorney fees involve the question of which party prevailed. The federal trial court in Massachusetts contended that parents were the prevailing party because the services that the school district provided were modified in a way that directly benefited them as a result of a due process hearing.[112]

The Second Circuit reasoned that a student in Connecticut who accomplished his goal of obtaining a community-based educational program by way of an agreement entered into during due process proceedings was a prevailing party entitled to attorney fees.[113] Similarly, a federal trial court in New York believed that a parent was a prevailing party entitled to attorney fees when she obtained a determination of her son's stay put placement and obtained an enforcement of her rights under the IDEA as a result of a settlement agreement.[114]

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[108] Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 [133 Educ. L. Rep. 748] (3d Cir. 1999).

[109] Peter v. Wedl, 155 F.3d 992 [129 Educ. L. Rep. 594] (8th Cir. 1998).

[110] Westendorp v. Independent Sch. Dist. No. 273, 35 F. Supp.2d 1134 [133 Educ. L. Rep. 97] (D. Minn. 1998).

[111] Wayne County Reg'l Educ. Serv. Agency v. Pappas, 56 F. Supp.2d 807 [137 Educ. L. Rep. 676] (E.D. Mich. 1999).

[112] Zak L. v. Cambridge Sch. Comm., 44 F. Supp.2d 395 [135 Educ. L. Rep. 68] (D. Mass. 1999).

[113] G.M. by R.F. v. New Britain Bd. of Educ., 173 F.3d 77 [134 Educ. L. Rep. 24] (2d Cir. 1999).

In Alabama, a federal trial court ruled that parents whose legal action was a catalyst in achieving the sought after educational outcomes for their child were entitled to attorney fees, even though a due process hearing was not conducted, since the district agreed to provide the requested services after they asked for a hearing.[115] Similarly, a federal trial court in New York awarded fees when parents succeeded in having their son classified under the IDEA only after they retained an attorney and made a request for a due process hearing.[116] The district acceded to each of the demands set forth by the parents' attorney and resolved the issues before due process hearings could take place.

In some cases, fees are granted but the courts reduce the requested amount. Such was the situation in Connecticut, where the federal trial court reduced the lodestar by 30% because the submitted records were vague and inconsistent.[117] Similarly, a trial court in Illinois reduced the billable hours because insufficient information was provided about the time that was spent on each specific task.[118] The court also stated that the number of hours the attorney claimed to have spent on some tasks was excessive.

The federal trial court in Massachusetts reduced a requested fee award because the parents, who were the prevailing party, had limited success.[119] Similarly, in Connecticut, the federal trial court reduced a fee award by 25% after comparing the relief sought to the relief obtained.[120]

When a school district contested the amount of fees requested, the federal district court in Connecticut found that the requested amount was reasonable and allowable.[121] The court was content that the hearing was highly contested and lengthy, and that the team litigation approach used by the parents' counsel was an appropriate, commonly used, and efficient means of litigating a complex case. In addition, the court discerned that expert witness fees were reimbursable as part of the costs.

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[114] K.R. *ex rel.* M.R. v. Board of Educ. of the Brentwood Union Free Sch. Dist., 66 F. Supp.2d 444 [139 Educ. L. Rep. 435] (E.D.N.Y. 1999).

[115] Doucet v. Chilton County Bd. of Educ., 65 F. Supp.2d 1249 [139 Educ. L. Rep. 375] (M.D. Ala. 1999).

[116] F.R. and K.R. v. Board of Educ., 67 F. Supp.2d 142 [139 Educ. L. Rep. 460] (E.D.N.Y. 1999).

[117] Mr. and Mrs. B. *ex rel.* W.B. v. Weston Bd. of Educ., 34 F. Supp.2d 777 [132 Educ. L. Rep. 759] (D. Conn. 1999).

[118] Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 29 F. Supp.2d 925 [131 Educ. L. Rep. 959] (C.D. Ill. 1998).

[119] Andrew S. *ex rel.* Margaret S. v. School Comm. of the Town of Greenfield, 59 F. Supp.2d 237 [138 Educ. L. Rep. 283] (D. Mass. 1999).

[120] M.C. *ex rel.* Mrs. C. v. Voluntown Bd. of Educ., 56 F. Supp.2d 243 [137 Educ. L. Rep. 625] (D. Conn. 1999).

[121] P.L. by Mr. and Mrs. L. v. Norwalk Bd. of Educ., 64 F. Supp.2d 61 [139 Educ. L. Rep. 245] (D. Conn. 1999).

A state appellate court in Florida maintained that state courts are authorized to award attorney fees under the IDEA.[122] The panel remarked that since state and federal courts have concurrent jurisdiction over IDEA actions, they have inherent authority to award attorney fees.

The Eighth Circuit refused to grant attorney fees under the IDEA in a suit from Iowa where parents succeeded only on a state law claim.[123] The court ruled that the parent was not a prevailing party under the IDEA.

In three cases, the courts held that prevailing parents could not recover attorney fees since the lawyers were not qualified to recover compensation. In a case from California, the Ninth Circuit affirmed the denial of a fee award to an attorney who was not admitted to the federal, but not state, bar.[124] Even though the parents prevailed in administrative due process hearings, the court wrote that since these were state proceedings, the existence of federal regulations did not convert them into federal proceedings. The Fourth Circuit affirmed that an attorney-parent in Maryland was not entitled to attorney fees, even though he had prevailed in a special education dispute.[125] Finally, a federal trial court in New York refused to award fees to parents who were not represented by an attorney.[126]

The First Circuit denied fees in a case from Massachusetts where the parents and school district entered into a settlement agreement that included a clause that released any and all claims that arose prior to the settlement.[127] According to the court, the phrase "any and all claims" encompassed attorney fees. The federal trial court in Maryland refused to award fees when a parent enrolled a student in a private school instead of allowing the implementation of a settlement agreement.[128] The court explained that the parent was not the prevailing party.

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[122] W.R. by Doe v. School Bd. of Osceola County, 726 So.2d 801 [133 Educ. L. Rep. 276] (Fla. Dist. Ct. App. 1999).

[123] John T. v. Marion Indep. Sch. Dist., 173 F.3d 684 [134 Educ. L. Rep. 104] (8th Cir. 1999).

[124] Z.A. v. San Bruno Park Sch. Dist., 165 F.3d 1273 [132 Educ. L. Rep. 68] (9th Cir. 1999).

[125] Doe v. Board of Educ. of Baltimore County, 165 F.3d 260 [131 Educ. L. Rep. 928] (4th Cir. 1998).

[126] Connors v. Mills, 34 F. Supp.2d 795 [132 Educ. L. Rep. 767] (N.D.N.Y. 1998).

[127] Alison H. v. Byard, 163 F.3d 2 [131 F.3d 578] (1st Cir. 1998).

[128] Board of Educ. of Hartford County v. Thomas, 36 F. Supp.2d 256 [133 Educ. L. Rep. 123] (D. Md. 1999).

In New Jersey, the federal trial court denied a request for fees when the parents sought a due process hearing after the school district contemplated changing a student's placement.[129] The request for the hearing was withdrawn when the school board agreed to continue the student's current placement. The court was of the opinion that the parents' action did not change the legal relationship between the parties.

The federal district court in Minnesota pointed out that a complaint issued under the IDEA's complaint resolution procedures is not an action or proceeding brought under the IDEA for purposes of recovering attorney fees.[130] However, the federal district court in Oregon reached a contrary result. That court observed that since a complaint resolution procedure is a process that may precede, but does not foreclose, a due process hearing, it is thus an alternative dispute resolution proceeding subject to an award of attorney fees.[131] Subsequently, the court stayed enforcement of the attorney fees award pending an appeal to the Ninth Circuit.[132]

State Immunity

In two separate actions, the Eighth Circuit upheld the IDEA's abrogation of states' Eleventh Amendment immunity. In a case from Arkansas, the court ascertained that since the IDEA was a valid exercise of Congress' enforcement power under the Fourteenth Amendment, Congress successfully abrogated the states' Eleventh Amendment immunity in the Act.[133] In the second action the court declared that section 1403 of the IDEA offers an unequivocal expression of Congress' intent to abrogate the state's immunity under that Act.[134] The court further reflected that since Congress conditioned a state's participation in the IDEA on a waiver of its immunity from suit in federal court, the state waived its Eleventh Amendment rights when it chose to participate in the federal spending programs created by the IDEA.

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[129] J.C. by J.C. and C.C. v. Mendham Township Bd. of Educ., 29 F. Supp.2d 214 [131 Educ. L. Rep. 743] (D. N.J. 1998).

[130] Megan C. v. Independent Sch. Dist. No. 625, 57 F. Supp.2d 776 [138 Educ. L. Rep. 167] (D. Minn. 1999).

[131] Lucht v. Molalla River Sch. Dist., 57 F. Supp.2d 1060 [138 Educ. L. Rep. 183] (D. Or. 1999).

[132] Lucht v. Molalla River Sch. Dist., 63 F. Supp.2d 1256 [138 Educ. L. Rep. 808] (D. Or. 1999).

[133] Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 [136 Educ. L. Rep. 775] (8th Cir. 1999).

[134] Bradley v. Arkansas Dep't of Educ., 189 F.3d 745 [138 Educ. L. Rep. 68] (8th Cir. 1999).

Other IDEA Issues

In two cases over the provision of early intervention services under Part C of the IDEA,[135] courts adopted a standard similar to the one outlined by the Supreme Court in *Rowley* for evaluating whether a proposed IEP is appropriate. A federal trial court in Maryland noted that it was appropriate to use the standard of whether proposed early intervention services are reasonably calculated to provide a child with developmental benefit.[136] The court upheld a finding that a draft Individual Family Service Plan (IFSP) was appropriate after observing that the parents' failure to cooperate was the primary reason why it was never finalized. In another suit involving the provision of early intervention services, the Ninth Circuit partially affirmed that a proposed IFSP for a student in Oregon, which was based on research, was reasonably calculated to develop the child and be responsive to his individual needs.[137]

State Laws

Special education is governed by state law as well as federal law. Each state's special education statutes must be consistent with the IDEA; however, differences do exist. Most states have legislation similar in scope to the IDEA, but several states have requirements that go beyond the IDEA's provisions. Some states have higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances, state laws establish procedures for special education program implementation that are not explicitly covered by federal law. Federal and state courts frequently are called upon to interpret those provisions.

Indiana

A state appellate court in Indiana indicated that it was not appropriate to appoint an educational guardian for a student when there was no evidence that her parent's conduct prevented the school from providing her with an IEP.[138] The court was of the view that a parent cannot obstruct the IEP process by failing to attend IEP meetings when the law placed no duty on the parent to do so. Further, the court commented that the district could seek review from an independent hearing officer and then implement any IEP approved by that officer.

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[135] 20 U.S.C. §§ 1431-1445.

[136] Wagner v. Short, 63 F. Supp.2d 672 [139 Educ. L. Rep. 232] (D. Md. 1999).

[137] Adams v. State of Or., 195 F.3d 1141 [139 Educ. L. Rep. 820] (9th Cir. 1999).

[138] E.N. *ex rel.* Nesbitt v. Rising Sun-Ohio County Community Sch. Corp., 720 N.E.2d 447 [139 Educ. L. Rep. 1029] (Ind. Ct. App. 1999).

Iowa

The Eighth Circuit affirmed an order directing a district to provide an aide to a student enrolled in a parochial school.[139] The court interpreted state law as clearly calling for the provision of special education and related services to students who attend nonpublic schools. The court added that the parents were not entitled to attorney fees because Iowa law does not authorize an award of attorney fees. As the case was resolved solely on the basis of state law, the court was not convinced that parents were entitled to attorney fees under IDEA either.

Louisiana

The Fifth Circuit reinstated a state statute that permitted the on-site delivery of special education services by public school teachers to nonpublic school students on the premises of sectarian schools.[140] The court decided that the statute's purpose, to provide special education and related services to disabled students, had a secular legislative purpose, did not provide the sectarian schools with any financial benefit, and did not create a symbolic link between government and religion.

Maine

The Supreme Judicial Court of Maine affirmed the denial of a request for attorney fees. The court posited that nothing in the state's special education statutes revealed an intent to create a separate cause of action for attorney fees in state courts.[141]

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[139] John T. v. Marion Indep. Sch. Dist., 173 F.3d 684 [134 Educ. L. Rep. 104] (8th Cir. 1999).

[140] Helms v. Picard, 151 F.3d 347 [128 Educ. L. Rep. 593] (5th Cir. 1998), *opinion amended and rehearing denied by Helms v. Picard*, 165 F.3d 311 (5th Cir. 1999), *cert. granted sub nom.* Mitchell v. Helms, 119 S. Ct. 2336 [135 Educ. L. Rep. 384] (1999).

[141] Goodwin v. School Admin. Dist. No. 35, 721 A.2d 642 [131 Educ. L. Rep. 781] (Me. 1998).

New York

An appellate court in New York affirmed a determination of the Department of Education that a private preschool and daycare center overstated certain reimbursable expenses.[142] The court agreed that the Department's review had a rational basis and was neither arbitrary nor capricious.

Oregon

The Ninth Circuit acknowledged that a state law stipulations that special education services must be provided to parochial school students in religiously neutral settings did not burden a student's free exercise of his religion.[143] According to the court, making services available at a neutral site did not amount to suppression of religion or religious conduct.

Pennsylvania

An appellate court in Pennsylvania invalidated an IEP as procedurally deficient because it failed to comply with state law by including a psychologist on the team.[144] The court further ordered the school district to pay a portion of the costs of an independent evaluation since it relied on that evaluation in developing the IEP.

Discrimination Under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance. . . ."[145] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment.

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[142] Crest Mainstream, Inc. v. Mills, 684 N.Y.S.2d 337 [132 Educ. L. Rep. 863] (N.Y. App. Div. 1999).
[143] KDM *ex rel.* WJM v. Reedsport Sch. Dist., 196 F.3d 1046 [139 Educ. L. Rep. 884] (9th Cir. 1999).
[144] Cumberland Valley Sch. Dist. v. Lynn T., 725 A.2d 215 [132 Educ. L. Rep. 851] (Pa. Commw. Ct. 1999).
[145] 29 U.S.C. § 794.

Section 504 applies to any agency that receives federal funds, not just the schools.

A person is considered to have a disability under section 504 if he or she has a physical or mental impairment that substantially limits one or more of life's major activities, has a record of such an impairment, or is regarded as having such an impairment.[146] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[147] The Supreme Court has held that a person is otherwise qualified for purposes of section 504 if he or she is capable of meeting all of a program's requirements in spite of the disability.[148] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities, unless doing so would create an undue hardship.[149]

Students

Elementary and Secondary

Students with disabilities at the elementary and secondary level have rights under section 504 as well as the IDEA. Students and their parents often file suits that state claims under both statutes. Frequently, the claims raised under one statute are identical or similar to those presented under the other law; however, sometimes distinct claims are filed under section 504.

In a case from Iowa, the Eighth Circuit ruled that there was no evidence of overt discrimination in a district policy that required parents to provide transportation where children voluntarily attended a school other than their neighborhood school, even when applied to a student with a disability.[150] The court contended that a student who required specialized transportation was not being denied access to the district's transfer program because of her disability. Establishing a separate bus route for the student would not be a reasonable accommodation, wrote the court, because it would impose a financial burden on the district.

In a second action, the Eighth Circuit affirmed that a student from Minnesota's claim that the programs he was placed in were not well suited to his learning needs established only a professional disagreement over the appropriate program but did not prove bad faith or gross misjudgment.[151] The court agreed that there was nothing in the record amounting to a showing that the district acted in bad faith or committed gross misjudgment in handling the case.

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[146] 29 U.S.C. § 706(7)(B).

[147] 34 C.F.R. § 104.3(j)(2)(ii).

[148] School Bd. of Nassau County v. Arline, 480 U.S. 273 [37 Educ. L. Rep. 448] (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[149] 34 C.F.R. § 104.12(a).

[150] Timothy H. v. Cedar Rapids Community Sch. Dist., 178 F.3d 968 [135 Educ. L. Rep. 911] (8th Cir. 1999).

Higher Education

The Ninth Circuit affirmed that a medical student with a learning disability could not meet the minimum standards of her medical school even with reasonable accommodations.[152] The court maintained that even though the medical school offered all of its usual accommodations, the student still failed to achieve passing grades, and further accommodations would have substantially altered the school's curriculum. Yet, in a second case involving the same university, the Ninth Circuit found that the medical school failed to show that it investigated proposed accommodations for a student with a learning disability to evaluate whether it could feasibly implement them.[153]

The federal trial court in Massachusetts concluded that a student could not claim a disability due to his poor eyesight because, as corrected, it did not substantially limit a major life activity.[154] While the student's corrected vision could vary from that of the general population, the court ascertained that such differences do not constitute a substantially limiting disability.

Two courts approved the denials of requests from students with disabilities for funding to continue their education by seeking advanced degrees. In a case from Florida, the Eleventh Circuit affirmed that section 504 did not entitle a profoundly deaf student who received financial assistance for a bachelor's degree to receive a free legal education.[155] In New York, an appellate court confirmed that since a hearing impaired student who received financial assistance for bachelor's and master's degrees was adequately empowered to reach her employment goals, she was not entitled to funding for doctoral studies.[156]

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[151] Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 [137 Educ. L. Rep. 150] (8th Cir. 1999).

[152] Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 [132 Educ. L. Rep. 81] (9th Cir. 1999).

[153] Wong v. Regents of the Univ. of Cal., 192 F.3d 807 [138 Educ. L. Rep. 698] (9th Cir. 1999).

[154] Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp.2d 234 [139 Educ. L. Rep. 425] (D. Mass. 1999).

[155] Berg v. Florida Dep't of Labor and Employment Security, Div. of Vocational Rehabilitation, 163 F.3d 1251 [131 Educ. L. Rep. 628] (11th Cir. 1998).

[156] Campbell v. Office of Vocational and Educ. Servs. for Individuals with Disabilities, New York State Educ. Dep't, 682 N.Y.S.2d 694 [131 Educ. L. Rep. 1092] (N.Y. App. Div. 1998).

Other Section 504 Issues

In a case from Wyoming, the Tenth Circuit decreed that entitlement to compensatory damages under section 504 requires proof that a defendant has intentionally discriminated against a plaintiff.[157] Further, federal trial courts in New York[158] and Virginia[159] offered that employees of institutions cannot be held personally liable under section 504.

The Eighth Circuit held that section 504 does not abrogate Eleventh Amendment immunity.[160] The court declared that section 504 is not a valid exercise of Congress' spending power and imposes overly broad conditions on state agencies by requiring a state to waive its Eleventh Amendment immunity if it receives federal funding. Further, the court pointed out that the imposition of such conditions amounts to impermissible coercion and is unconstitutional.

In a case from Virginia, a federal trial court remarked that the statute of limitations for filing suit under section 504 was contained in the state's rehabilitation act.[161] As such, the court barred the plaintiffs' section 504 suits as untimely since they were not filed within the one-year period called for in that statute.

In a case from Puerto Rico, the First Circuit affirmed that attorney fees cannot be awarded to a prevailing defendant unless he or she can show that a plaintiff's suit was totally unfounded, frivolous, or otherwise unreasonable.[162] The initial dispute involved the issuance of an injunction against a private school that was later lifted on appeal. The private school then unsuccessfully sought to recover its legal costs.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA),[163] enacted in 1990, is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; however, in as much as many of its provisions apply to public entities and are similar in scope to those of section 504, suits filed under the ADA should interest consumers of education law. Generally, compliance with section 504 will result in compliance with the ADA; even so, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act. Many claims that arise in the public sector are now brought on the basis of the ADA as well as section 504. In most cases, the disposition for both laws is identical. Cases that were discussed in the section 504 part of this chapter that had identical decisions rendered under the ADA are not be repeated in this section.[164]

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[157] Powers v. MJB Acquisition Corp., 184 F.3d 1147 [137 Educ. L. Rep. 177] (10th Cir. 1999).

[158] Coddington v. Adelphi Univ., 45 F. Supp.2d 211 [135 Educ. L. Rep. 110] (E.D.N.Y. 1999).

[159] Bracey v. Buchanan, 55 F. Supp.2d 416 [137 Educ. L. Rep. 528] (E.D. Va. 1999).

[160] Bradley v. Arkansas Dep't of Educ., 189 F.3d 745 [138 Educ. L. Rep. 68] (8th Cir. 1999).

[161] Bernard v. School Bd. of the City of Norfolk, 58 F. Supp.2d 669 [138 Educ. L. Rep. 226] (E.D. Va. 1999).

[162] Bercovitch v. Baldwin Sch., 191 F.3d 8 [138 Educ. L. Rep. 148] (1st Cir. 1999).

[163] 42 U.S.C. § 12101 *et seq.*

Elementary and Secondary

The federal district court in Oregon was of the opinion that an athletic association failed to present evidence that would explain why its eight-semester rule was an essential requirement as applied to learning disabled students who require extra semesters to graduate due to their disabilities, while it permitted exceptions of other eligibility rules.[165] The court added that a waiver of the rule under the circumstances of the case was a reasonable accommodation. Similarly, the Seventh Circuit affirmed that the waiver of an eight-semester rule in the case of learning disabled student from Indiana would not create a fundamental alteration of the rule.[166] The court explained that the association had granted waivers of the rule in the past and that none of the dangers that prompted its adoption were present in this case.

The federal trial court in Massachusetts granted a preliminary injunction to require a private school to readmit a bright student who had attention deficit disorder.[167] The school had required the student to withdraw during the first trimester of his senior year after he had received poor grades in spite of many accommodations. The court was of the view that the student's failure could be a natural and probable consequence of his learning disorder. However, the court later denied the student's motion for a permanent injunction to readmit him to the school.[168] This time the court stated that even with reasonable accommodations the student was not otherwise qualified to continue at the school. The court agreed that the student was required to withdraw because of his overall academic record and his failure to meet the requirements placed on him after he had been given an academic warning.

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[164] Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 [137 Educ. L. Rep. 150] (8th Cir. 1999); Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 [132 Educ. L. Rep. [81] (9th Cir. 1999); Wong v. Regents of the Univ. of Cal., 192 F.3d 807 [138 Educ. L. Rep. [698] (9th Cir. 1999); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp.2d 234 [139 Educ. L. Rep. [425] (D. Mass. 1999); Bracey v. Buchanan, 55 F. Supp.2d 416 [137 Educ. L. Rep. [528] (E.D. Va. 1999); Coddington v. Adelphi Univ., 45 F. Supp.2d 211 [135 Educ. L. Rep. [110 (E.D.N.Y. 1999);Bercovitch v. Baldwin Sch., 191 F.3d 8 [138 Educ. L. Rep. [148] (1st Cir. 1999).

[165] Bingham v. Oregon Sch. Activities Ass'n, 37 F..Supp.2d 1189 [133 Educ. L. Rep. 840] (D. Or. 1999).

[166] Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 [136 Educ. L. Rep. 713] (7th Cir. 1999).

[167] Axelrod v. Phillips Academy, Andover, 36 F. Supp.2d 46 [133 Educ. L. Rep. 423] (D. Mass. 1999).

A federal trial court in California issued a preliminary injunction requiring a private school to rescind a no medications policy when it would not allow an asthmatic student to bring an inhaler to school.[169] The court noted that requiring teachers to recognize symptoms of wheezing and supervising the student's use of his inhaler would not fundamentally alter the nature of the school's educational program. Also, the court was not convinced that requiring the teachers to attend a one-hour training session would pose an undue burden.

In a case from Virginia, the Fourth Circuit observed that a student's factual assertions were adequate to allege that she was excluded from her school's show choir because of her disability.[170] The student, who suffered from depression, was frequently absent and had not been chosen for a lead role and had been excluded from a performance allegedly due to her absence.

Higher Education

A federal trial court in Michigan denied a requested injunction that would have required the National Board of Medical Examiners to give a student extra time on examinations.[171] The board determined that since the student was not disabled, he was not entitled to accommodations. The court agreed in positing that being average or slightly below average is not a disability under the ADA.

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[168] Axelrod v. Phillips Academy, Andover, 46 F. Supp.2d 72 [135 Educ. L. Rep. 461] (D. Mass. 1999).

[169] Alvarez v. Fountainhead, Inc., 55 F. Supp.2d 1048 [137 Educ. L. Rep. 592] (N.D. Cal. 1999).

[170] Baird v. Rose, 192 F.3d 462 [138 Educ. L. Rep. 686] (4th Cir. 1999).

[171] Gonzalez v. National Bd. of Med. Examiners, 60 F. Supp.2d 703 [138 Educ. L. Rep. 403] (E.D. Mich. 1999).

The Eighth Circuit upheld the dismissal of a medical student on the basis that his academic difficulties and behavioral problems provided a legitimate nondiscriminatory reason for his dismissal.[172] The court could find no evidence that the student's disability served as a motivating factor in any of the medical school's adverse decisions.

Conclusion

In 1999, the Supreme Court issued another landmark interpretation of the IDEA. In *Garret F.*, the Court ruled that school districts are required to provide extensive nursing services to medically fragile students under the related services mandate. Prior to *Garrett F.*, lower courts disagreed over whether a full-time nurse was included under the rubric of the related services mandate or was an exempted medical service. In light of *Garrett F.*, the issue is now settled.

One important issue that remains unsettled is whether damages are available when a district fails to provide a student with a FAPE. For many years, most courts agreed that damages were not available under the IDEA. In recent years, however, the legal climate has been changing and several courts have held that damages are available, as the judiciary has been empowered to fashion equitable relief. In some of these cases, the courts have decided that damages are available under section 1983 for a violation of the IDEA.

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[172] Amir v. St. Louis Univ., 184 F.3d 1017 [137 Educ. L. Rep. 164] (8th Cir. 1999).

6

TORTS

William J. Evans, Jr.

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Introduction

Tort law offers remedies to individuals for harm caused by the unreasonable conduct of others. This chapter examines cases brought by or on behalf of students, school employees, and, in some instances, visitors on school grounds. Tort actions resulting from interscholastic sports are discussed in Chapter 7, *Sports*.

Negligence

Negligence is the most common tort committed by school personnel. A tort can arise when an improper act, or failure to act, causes injury to another. At the same time, an individual cannot be liable for a tort unless there is a causal relationship between the alleged conduct and the injury. When an injured party claims that a tort has occurred, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would, or should, have done in the same or similar circumstances.

The first case involves a class action by parents who sought to recover deposits paid for school trips that were never taken. Reversing in favor of a school district, an appellate court in New York found it did not provide any false information to parents. The court added that the parents could not base a cause of action for negligent misrepresentation on the district's alleged failure to investigate the travel agent's qualifications and financial stability.[1]

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases are divided into categories according to where or how an injury was sustained and when sovereign or statutory immunity was not used as the defense.

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[1] Dunlevy v. New Hartford Cent. Sch. Dist., 697 N.Y.S.2d 446 [139 Educ. L. Rep. 579] N.Y.(App. Div. 1999).

Off School Property and After School Hours

A female foreign exchange student and her parents sued a sponsoring agency for its alleged failure to supervise her stay in the United States in light of her having become sexually involved with the father of her host family. A federal trial court in Wisconsin refused to grant the agency's motion for summary judgment based on its failure to monitor the student's school attendance adequately, to follow-up with personal visits, telephone calls, and supervision, and for violations of federal regulations governing exchange students.[2]

In the first of four cases from New York, an appellate court held that a district was not liable where a student was assaulted in her home after the end of the school day. The court was of the view that the assault on the student by her estranged boyfriend, in violation of an order of protection, could not be considered the district's negligence.[3]

A cheerleader unsuccessfully sued her school district for injuries she suffered during practice. An appellate court in New York affirmed that the cheerleader assumed the risks of her sport and was practicing voluntarily under the supervision of her coach.[4]

In New York, a student who was injured in a fight with another child off of school property and after classes ended sued her district over her injuries. Citing the principle that a student who removes herself from school grounds may no longer look to the district for protection, an appellate court affirmed the dismissal of her action.[5]

After a volunteer art teacher sexually molested a student while off of school premises, the child sued the board of education for failure to supervise. An appellate court in New York, reversing in favor of the board, ruled that the principal's failure to complete a background check on the volunteer, which was not a part of school policy, could not serve as the basis for a cause of action for negligent hiring. In addition, the court observed that the school's granting the volunteer permission to work with students was not the proximate cause of the child's injury.[6]

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[2] Beul v. ASSE Int'l, 55 F. Supp.2d 942 [137 Educ. L. Rep. 574] (E.D. Wis. 1999).

[3] Tamaras v. Farmingdale Sch. Dist., 694 N.Y.S.2d 413 [137 Educ. L. Rep. 757] (N.Y. App. Div. 1999).

[4] Fisher v. Syosset Cent. Sch. Dist., 694 N.Y.S.2d 691 [137 Educ. L. Rep. 761] (N.Y. App. Div. 1999).

[5] Youngs v. Bay Shore Union Free Sch. Dist., 686 N.Y.S.2d 444 [133 Educ. L. Rep. 1008] (N.Y. App. Div. 1999).

[6] Koran v. New York City Bd. of Educ., 683 N.Y.S.2d 228 [132 Educ. L. Rep. 170] (N.Y. App. Div. 1998) *See also* Godar v. Edwards, 588 N.W.2d 701 [132 Educ. L. Rep. 173] (Iowa 1999) (where a school district was absolved from charge of negligent hiring in a sexual abuse case).

Where a six-year-old student in an after school enrichment program sustained a head injury, staff members withheld this knowledge from his mother. The delay in medical treatment led to the child's sustaining permanent brain and vision impairments. An appellate court in North Carolina decided that since staff members in the program undertook a duty that was traditionally provided by local government, they were entitled to immunity to the extent they were sued in their official capacities.[7] However, the court also posited that the employees could be personally liable for their alleged negligence.

Parents of a fifteen-year-old student who committed suicide while truant from school brought a wrongful death action against their district and its insurer. An appellate court in Wisconsin affirmed that even if the district had a duty to notify the parents of the truancy or follow up on a tip from another student, the suicide was an intervening cause that was too remote to render the district liable.[8]

In another case, parade sponsors settled spectators' personal injury claims for burns caused by a fire that started in a can of liquid used to ignite the batons of marching band members. The sponsors had sought indemnification from a school board. The Supreme Court of Florida determined that the sponsors could not recover on a claim of common-law indemnity as there was no special relationship between them and the board.[9]

En Route To and From School

The five cases in this section came from two states, New York and Louisiana. In the first action, a nine-year-old student was injured when he was struck by a truck as he attempted to cross a road while walking home. The Court of Appeals of New York affirmed that it was a matter for trial as to whether the district breached its duty of supervision by departing from its long-standing policy of not releasing students to walk home until all school busses had departed. Further, the court ascertained that there were questions of material fact as to whether the county was aware of the hazardous conditions in the vicinity of the school.[10]

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[7] Schmidt v. Breeden, 517 S.E.2d 171 [136 Educ. L. Rep. 1063] (N.C. Ct. App. 1999).

[8] McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875 [136 Educ. L. Rep. 568] (Wis. Ct. App. 1999).

[9] Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638 [135 Educ. L. Rep. 268] (Fla. 1999) *See also* Ashcraft v. Northeast Sullivan County Sch. Corp., 706 N.E.2d 1101 [132 Educ. L. Rep. 897] (Ind. Ct. App. 1999) (where a school corporation was not responsible for cheerleader's injury during a public parking lot fund raiser).

Parents of a student who was injured when struck by a car as he exited a bus sued the bus company, driver, and school district. An appellate court in New York affirmed that the failure of the bus company to equip it as a school bus did not violate the statute regulating school busses because the law was inapplicable to a bus that was not used solely to transport students. The court added that the district's offering students the opportunity to purchase bus tokens at a discount was not the same as providing them with transportation.[11]

A student's failure to wear a seatbelt on a school bus was at issue where a child was injured in an accident caused by a motorist. An appellate court in New York affirmed that the mere allegation that the student was improperly instructed on seat belt use did not support his negligence action.[12]

In Louisiana, a school board challenged its liability when a student was struck and injured by a truck while crossing the street where his school bus stop was located. Reversing in favor of the board, an appellate court declared that it did not have the duty to ensure that the student reached his designated bus stop safely prior to the arrival of his school bus.[13]

Another appellate court in Louisiana examined whether a school board owed a duty to ensure the safety of a child who walks home from school after an extra-curricular activity. The board stationed crossing guards at the highway where the student was injured, but only at the end of the school day, not following after school activities. The court affirmed that the one hour time period that the guard was on duty was appropriate, that it was unreasonable to impose a duty on school officials to require students to walk home in groups, and that the teacher acted prudently in allowing the student to walk home alone since the child did so regularly.[14]

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[10] Ernest v. Red Creek Cent. Sch. Dist., 695 N.Y.S.2d 531 [138 Educ. L. Rep. 473] (N.Y. 1999).

[11] Sigmond v. Liberty Lines Transit, 689 N.Y.S.2d 239 [135 Educ. L. Rep. 218] (N.Y. App. Div. 1999).

[12] O'Connor v. Mahopac Cent. Sch. Dist., 692 N.Y.S.2d 76 [136 Educ. L. Rep. 533] (N.Y. App. Div. 1999).

[13] Cavalier v. Ward, 723 So. 2d 480 [131 Educ. L. Rep. 1166] (La. Ct. App. 1998).

[14] Jackson v. Colvin, 732 So. 2d 530 [135 Educ. L. Rep. 296] (La. Ct. App. 1998).

School Settings During School Hours

Of the fifteen cases in this section, nine are from New York. Overall, defendants prevailed six times. In the first case, the parents of a special education student who was murdered on school grounds by another special education student brought a wrongful death action against the district. An appellate court in New York affirmed that the district was not liable since school officials lacked notice that the attacking student was dangerous. The court noted that although the student made threats against a former girlfriend, there was no evidence that this information had been passed on to school personnel.[15]

A student sued his school district for hand injures he sustained when a glass window in the cafeteria shattered. An appellate court in New York affirmed the dismissal of the action based on the student's failure to present a prima facie case of negligence. The court reasoned that there was no basis for a case since there had not been any similar accidents in the school, the glass complied with regulations that were in effect when the school was built, and the district was not required to replace the glass to comply with new regulations.[16]

Another appellate court in New York affirmed a portion of an opinion dismissing a damages action filed on behalf of a student who was injured when he was cut by shreds of glass behind a bush abutting his school. The court agreed that the district could not be liable for failure to maintain or inspect its property since it did not have constructive notice of the presence of the glass. Yet, the court refused to dismiss the claim of negligent supervision, as material questions of fact remained over whether a reasonably prudent parent would have allowed a child to play around and between bushes and be unaware of the child's whereabouts for five to ten minutes.[17]

A seventh grade student was hurt playing touch football during recess, and he unsuccessfully sued his district to recover for his injuries. An appellate court in New York affirmed that the teacher's conduct while playing in the game did not expose the injured student to any unreasonable risks.[18]

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[15] Marshall v. Cortland Enlarged City Sch. Dist., 697 N.Y.S.2d 395 [139 Educ. L. Rep. 574] (N.Y. App. Div. 1999).

[16] Bradley v. Smithtown Cent. Sch. Dist., 696 N.Y.S.2d 65 [138 Educ. L. Rep. 887] (N.Y. App. Div. 1999).

[17] Feldman v. South Huntington Union Free Sch. Dist., 691 N.Y.S.2d 120 [136 Educ. L. Rep. 513] (N.Y. App. Div. 1999).

[18] Hamill v. Town of Southampton, 689 N.Y.S.2d 196 [135 Educ. L. Rep. 215] (N.Y. App. Div. 1999).

In another case, a student sued his school district seeking damages for the injuries he suffered at the hands of fellow pupils. An appellate court in New York affirmed the denial of the district's motion for summary judgement where the injuries occurred on two occasions when students, in violation of school rules, gathered in corridors without supervision. The court rejected the board's argument that the spontaneous, unanticipated actions of the students were the intervening and superseding causes of the child's injuries. The court was also concerned that there were questions of fact as to whether the district breached its duty to provide adequate supervision for its students, whether it had constructive notice of the dangerous conduct of the students, and whether these factors were the proximate cause of the student's injuries.[19]

Where an eleven-year-old student was hurt while participating in a relay race during recess, a trial court in New York denied the school district's motion for summary judgment in her personal injury action. The court conceded that while the student assumed the risks inherent in racing, questions of fact remained as to whether the race's taking place too close to a stage created a greater risk of injury than she would have otherwise been aware of.[20]

A private school challenged the denial of its motion for summary judgment where a student sought damages for injuries he received in a fight with a schoolmate. Reversing in favor of the school, an appellate court pointed out that it could not be liable because it did not have actual or constructive notice of prior or similar violent conduct on the part of the offending student.[21]

In New York, a student who was shot in the hall of his high school unsuccessfully filed a negligence action against a city. An appellate court affirmed that the school did not have a special relationship with the student, giving rise to a duty to protect him. Further, the court rejected the student's argument that his being released from class five minutes early was the proximate cause of his injuries.[22]

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[19] Dean v. Falconer Cent. Sch. Dist., 688 N.Y.S.2d 319 [134 Educ. L. Rep. 553] (N.Y. App. Div. 1999).

[20] Blanco v. Elmont Union Free Sch. Dist., 687 N.Y.S.2d 235 [134 Educ. L. Rep. 280] (N.Y. Sup. Ct. 1999).

[21] Gibiser v. LaSalle Ctr., 685 N.Y.S.2d 98 [133 Educ. L. Rep. 223] (N.Y. App. Div. 1999).

[22] Dickerson v. City of New York, 684 N.Y.S.2d 584 [132 Educ. L. Rep. 875] (N.Y. App. Div. 1999).

When a student sued his school district for failing to prevent an altercation during an orientation program, an appellate court in New York affirmed that the district did not breach its duty of supervision because the fight was unforeseeable. Even though the offending student threatened to begin a fight, the court was not convinced that this was sufficient for the district to anticipate his eventually surprising the victim by hitting him with a "sucker punch."[23]

A student brought a personal injury action against his elementary and high school claiming that officials negligently failed to notify his parents of an abnormal spine condition that was revealed during periodic examinations conducted by licensed nurses who were employed by the county. The Supreme Court of Nebraska affirmed, as a matter of law, that the schools did not have a duty to supervise nurses or take steps to ensure they were informing parents of abnormal conditions.[24]

The administrator of the estate of a second grade student who was killed when a soccer goal fell on him during recess won a wrongful death action against the school district. On further review, the Supreme Court of New Hampshire reinstated a jury award of $950,000, as the sum was not excessive and within the limits of the district's insurance policy.[25]

Negligent supervision was at issue where a female high school student alleged she was raped by a male student. The Supreme Court of South Carolina affirmed that evidence of the victim's willing participation in the sexual encounter was relevant in her subsequent civil trial for damages but irrelevant and inadmissable on the issue of liability.[26]

In a second case from South Carolina, an appellate court affirmed that a school district was liable for gross negligence where a classmate sexually assaulted a female student with a mental disability. The court deemed the assault foreseeable where school officials were aware of another sexual incident that had occurred two weeks earlier.[27]

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[23] Busby v. Ticonderoga Cent. Sch. Dist., 684 N.Y.S.2d 709 [132 Educ. L. Rep. 890] (N.Y. App. Div. 1999).

[24] Koltes v. Visiting Nurse Assoc., 591 N.W.2d 578 [133 Educ. L. Rep. 1035] (Neb. 1999).

[25] Marcotte v. Timberlane/Hampstead Sch. Dist., 733 A.2d 394 [136 Educ. L. Rep. 914] (N.H. 1999).

[26] Doe v. Orangeburg County Sch. Dist. No. 2, 518 S.E.2d 259 [137 Educ. L. Rep. 837] (S.C. 1999).

[27] Duncan v. Hampton County Sch. Dist. #2, 517 S.E.2d 449 [136 Educ. L. Rep. 1076] (S.C. Ct. App. 1999).

In another case, a disruptive student was removed from class because of his behavior, and his parents unsuccessfully sued his private school for assault, battery, and breach of contract. An appellate court in Louisiana affirmed that the school did not abuse its right to discipline the student when the teacher physically removed him from the classroom because the teacher's primary motive was to preserve discipline in order to maintain harmony and promote education. The court asserted that the parents failed to establish the necessary element of damages because they received a refund and an offer to refund their outlay for books and uniforms.[28]

In a second case from Louisiana, a student who was injured while attempting a long jump in physical education class successfully sued his school board because he did not receive instructions about proper landing and control in the air. An appellate court affirmed that the lack of supervision constituted a breach of the board's duty of care to the student.[29]

In School Buildings and on School Grounds

An eighty-two-year-old woman who was injured when she fell on school property alleged that it created a dangerous condition. In reversing a grant of summary judgment that had been entered on behalf of the district, the Supreme Court of Nebraska explained that school officials knew or should have known that an unmarked and unguarded floor riser created an unreasonable risk of harm to visitors.[30]

In the first of four cases from New York, the owner of property adjacent to a park owned by a school district and maintained by a city sued both parties for water damage to her property. The owner claimed that the damage was the result of negligent grading of the park and removal of dead trees. An appellate court in New York stated that the city and district were not liable because the water was not artificially drained onto the property and the improvements to the park were made in good faith.[31]

A mother unsuccessfully sued a district and architects who designed its playground equipment after her foot was caught and injured in a staircase riser on school grounds. An appellate court in New York affirmed the dismissal in favor of the defendants on the basis that the equipment was not inherently dangerous for its intended use.[32]

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[28] Frame v. Comeaux, 735 So. 2d 753 [136 Educ. L. Rep. 640] (La. Ct. App. 1999).

[29] Scott v. Rapides Parish Sch. Bd., 732 So. 2d 749 [135 Educ. L. Rep. 304] (La. Ct. App. 1999).

[30] Parker v. Lancaster City Sch. Dist., 591 N.W.2d 532 [133 Educ. L. Rep. 1025] (Neb. 1999).

[31] Condello v. Town of Irondequoit, 693 N.Y.S.2d 775 [137 Educ. L. Rep. 332] (N.Y. App. Div. 1999).

The mother of a child who was injured in a fall on a school stairway sued the district over his injuries. An appellate court in New York affirmed the denial of the district's motion for summary judgment where there were genuine issues of material fact as to whether a height differential caused by a repair on the stairway created a dangerous condition and whether it caused the child's injuries.[33]

A fourth grade student in New York was unable to recover for injuries she sustained when she fell on a sidewalk in front of her school. An appellate court affirmed that the student's intentionally stepping on a piece of ice precluded a showing of negligent failure to supervise as a proximate cause of her injury.[34]

Negligence Defenses

School districts, administrators, and/or teachers involved in negligence actions have a number of defenses available ranging from common law sovereign immunity to more affirmative defenses. The motivation behind common law immunity is to limit the flow of public money to private citizens because such payments detract from the educational functions of the schools. Affirmative defenses bar recovery by parties whose behavior in some way caused their injuries.

Immunity

Courts have generally been reluctant to disturb school district immunity. Even so, plaintiffs were able to overcome district immunity in seven of the fourteen reported cases. In several instances, individuals were able to overcome immunity defenses where districts had failed to meet their obligations.

Common Law (Governmental Immunity)

The parents of a high school student brought an action on behalf of their son who was injured on a test drive with a faculty member during automotive shop class. An appellate court in Georgia indicated that while the shop instructor was entitled to official immunity, issues remained as to whether the board's purchasing insurance resulted in a waiver of its sovereign immunity.[35]

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[32] Belkin v. Middle Country Cent. Sch. Dist., 691 N.Y.S.2d 84 [136 Educ. L. Rep. 511] (N.Y. App. Div. 1999).

[33] Slate v. Fredonia Cent. Sch. Dist., 682 N.Y.S.2d 507 [131 Educ. L. Rep. 1082] (N.Y. App. Div. 1998).

[34] Banks v. City Sch. Dist. of Albany, 682 N.Y.S.2d 474 [131 Educ. L. Rep. 1080] (N.Y. App. Div. 1999).

Parents of a student who was raped in a school locker room brought an action alleging that the district failed to provide adequate supervision, protection, and security, and/or enact or enforce appropriate security policies. An appellate court in Minnesota affirmed that since three employees who saw the intruder before the assault were engaged in discretionary activities, they were entitled to official immunity. The court refused to extend immunity to the district in remarking that this would have rewarded it for not developing and implementing basic security policies for use under the circumstances.[36]

In a second case from Minnesota, a former student sued her school district over the conduct of a teacher with whom she had a sexual relationship. An appellate court in Minnesota affirmed that the district's decisions as to the method, manner, and extent of investigation of an anonymous tip were policy judgments entitled to discretionary immunity.[37]

A pedestrian who slipped and fell on a snow and ice covered landing at the top of a set of stairs in front of a school building filed a negligence action against the district. An appellate court in Pennsylvania upheld a judgment in favor of the pedestrian. The court agreed that the district was liable because its failure to remove the ice and snow fell within the real property exception to governmental immunity.[38]

Statutory Immunity

Parents of a third grade girl who was assaulted on school grounds by older children sued their district for negligent supervision. The Supreme Court of Idaho affirmed that the state's Tort Claims Act shielded the district from liability. The court rejected the parents' claim that since the negligent supervision charge related to their injured daughter rather than the individuals who committed the harm, the district should have lost its coverage under the law's intent to limit liability of governmental entities.[39]

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[35] Chamlee v. Henry County Bd. of Educ., 521 S.E.2d 78 [139 Educ. L. Rep. 706] (Ga. Ct. App. 1999).

[36] S.W. v. Spring Lake Park Sch. Dist. No. 16, 592 N.W.2d 870 [134 Educ. L. Rep. 566] (Minn. Ct. App. 1999).

[37] Doe v. Park Ctr. High Sch., 592 N.W.2d 131 [134 Educ. L. Rep. 307] (Minn. Ct. App. 1999).

[38] Snyder v. North Allegheny Sch. Dist., 722 A.2d 239 [131 Educ. L. Rep. 795] (Pa. Commw. Ct. 1998).

[39] Coonse v. Boise Sch. Dist., 979 P.2d 1161 [135 Educ. L. Rep. 1086] (Idaho 1999) *But see* Brown v. Akron Bd. of Educ., 717 N.E.2d 1115 [138 Educ. L. Rep 519] (Ohio Ct. App. 1999) (where the rejection of a district's motion for summary judgment did not deny it the benefit of sovereign immunity).

A mother who was injured while supervising an outdoor education program activity at her child's school sued the district and the private operator of the camp. The Supreme Court of Nebraska commented that since the money paid to the camp operator was not received under a lease to the state for recreational purposes, it was not entitled to protection under the state's immunity statute. However, the court wrote that the district could invoke statutory protection.[40]

In another case, parents sued their district after their son slipped and fell in a school hallway while walking on crutches. The Supreme Court of Ohio found that the district was not entitled to immunity because its decision-making process as to whether school custodians should attempt to repair a leaking water fountain did not involve the exercise of judgment or discretion. Rather, the court observed that relying on school personnel rather than an outside plumbing service was a negligent maintenance decision.[41]

In a second case from Ohio, parents of a second-grade student was dropped off early by his school bus driver and died as a result of injuries that he suffered while attempting to enter his house through a window filed a negligence action. The Supreme Court of Ohio concluded that while the district waived its right to statutory immunity, a genuine issue of material fact existed as to whether the driver violated the statute prohibiting school bus drivers from starting their busses until after the children leaving them have reached places of safety.[42]

A high school student who broke his forearm while using a springboard in gym class to try to touch a basketball rim unsuccessfully sued his district. An appellate court in Kansas affirmed that since the gymnasium was public property for the purposes of governmental immunity, the student's being injured there while engaged in a recreational purpose entitled the district to immunity. The court also believed that the teacher's allowing the student to act as he did fell within the discretionary function exception to liability.[43]

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[40] Teters v. Scottsbluff Pub. Schs., 592 N.W.2d 155 [134 Educ. L. Rep. 313] (Neb. 1999).

[41] Perkins v. Norwood City Schs., 707 N.E.2d 868 [133 Educ. L. Rep. 233] (Ohio 1999).

[42] Turner v. Central Local Sch. Dist., 706 N.E.2d 1261 [132 Educ. L. Rep. 909] (Ohio 1999).

[43] Jackson v. Unified Sch. Dist. 259, 979 P.3d 151 [135 Educ. L. Rep. 828] (Kan. Ct. App. 1999).

In New Jersey, a high school student who was sexually harassed on a school bus challenged the denial of her motion to file a late notice of claim. An appellate court affirmed that while charitable immunity precluded the student's negligence claim against the school, it did not protect the principal or prevent the student from filing a third-party action against the township and board of education for indemnification.[44]

In a separate case, when a physical education teacher playfully tossed a football to a school secretary, striking her in the jaw, a trial court granted the teacher's motion for summary judgment. An appellate court in Florida affirmed that since tossing the ball was not willful and wanton conduct, the teacher was entitled to state-employee immunity.[45]

In North Carolina, a visitor sued a school board for damages arising out of an accident that took place as she attended a haunted house event sponsored by a Parent-Teacher Association (PTA). An appellate court affirmed that the PTA's failure to follow the board's rules precluded its being entitled to immunity. The court ruled that even though state law permits a local board to waive its immunity by securing liability insurance, purchasing insurance does not constitute a waiver when personal injuries are sustained when using school property for non-school purposes, pursuant to an agreement with a non-school group that is consistent with the local board's rules and regulations.[46]

Where a student injured his hand using a table saw in shop class, he unsuccessfully sued his school district for damages. An appellate court in Illinois reversed in favor of the student because there was a material question of fact as to whether there was independent negligence on the part of the district that would preclude an extension of the shop teacher's immunity.[47]

Other Defenses

Comparative Negligence

When a student on a school bus threatened a fellow pupil with physical violence, the bus driver removed both children at the next stop and called the principal. When the bus driver re-entered the bus to move it out of the path of traffic, the first student carried through with the assault. An appellate court in Louisiana found the driver fifteen percent at fault while the assaulting student was liable for the remaining eighty-five percent. The court also rejected the student's action against the board for failure to supervise since the common carrier doctrine no longer applied once she was safely delivered to school grounds.[48]

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[44] S.P. v. Collier High Sch., 725 A.2d 1142 [133 Educ. L. Rep. 183] (N.J. Super. Ct. App. Div. 1999).

[45] Castellano v. Raynor, 725 So. 2d 1197 [133 Educ. L. Rep. 273] (Fla. Dist. Ct. App. 1999).

[46] Seipp v. Wake County Bd. of Educ., 510 S.E.2d 193 [132 Educ. L. Rep. 234] (N.C. Ct. App. 1999).

[47] Courson v. Danville Sch. Dist. No. 118, 704 N.E.2d 447 [131 Educ. L. Rep. 1073] (Ill. Ct. App. 1998).

An estate in Michigan sued a school bus driver and director of transportation when a child died after being hit by a car at a school bus stop. At issue on appeal was whether the trial court erred in its application of comparative negligence to the child's estate. An appellate court contended that the estate waived further review of the trial court's alleged error because its counsel did not want a jury instruction regarding comparative negligence and was only concerned with the percentage of the negligence that the estate bore.[49]

Notice of Claim

Requiring injured parties to file timely notices of claim is designed to provide defendants with opportunities to investigate complaints while the facts are still fresh. Plaintiffs successfully challenged notice requirements in the first six of the fourteen reported cases.

The mother of a child who was injured when she was struck by a truck owned by the school district sued the driver and district. The Supreme Court of Mississippi reinstated the mother's claim based on the existence of a letter from her attorney showing that he sufficiently complied with notice requirements.[50]

A superintendent of schools sued the Teacher Standards and Practices Commission to recover for negligent supervision over the unauthorized disclosure of an investigation against him in his official capacity. The Supreme Court of Oregon decreed that since the superintendent's claim did not allege an underlying tortious act of defamation for the purpose of the statute of limitations, it was not time barred.[51]

In New York, the mother of a fifteen-year-old student who was injured while doing a back flip in gym class was granted a motion to file a late notice of claim. An appellate court affirmed in favor of the mother because her motion met the three criteria necessary to succeed: there was a reasonable excuse for the delay since the extent of the child's injuries was not immediately known, the district had actual notice of the essential facts constituting the claim, and the delay did not substantially prejudice the district in maintaining its defense.[52]

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[48] Bell v. Ayio, 731 So. 2d 893 [135 Educ. L. Rep. 1112] (La. Ct. App. 1998).

[49] Dedes v. Asch, 590 N.W.2d 605 [133 Educ. L. Rep. 581] (Mich. Ct. App. 1999).

[50] Reaves v. Randall, 729 So. 2d 1237 [134 Educ. L. Rep. 417] (Miss. 1999).

[51] Bradbury v. Teacher's Standard and Practices Comm'n., 977 P.2d 1153 [134 Educ. L. Rep. 1049] (Or. 1999).

When a twelve-year-old student alleged that he was sexually harassed by his teacher, an investigation was closed without any action being taken. Nine months after reaching the age of eighteen, the student sought to serve a late notice of claim against the school district. An appellate court in New York affirmed the student's motion to serve the late notice of claim because the district had actual knowledge of the facts giving rise to it and the teacher was still available.[53]

An appellate court in New York affirmed a plaintiff's motion to file a late notice of claim against a municipal board of education. The court acknowledged that since the board had a copy of a report which indicated there were no witnesses to the accident from the outset, it had notice of the facts upon which the claim was based.[54]

When a special education student drowned, the student's estate unsuccessfully filed a wrongful death action against the cooperative education service agency which ran his program. An appellate court in Wisconsin reversed the denial of the estate's motion to serve late notice of claim since the agency was not a state agency requiring a notice of claim. Rather, the court was of the view that since the agency was a governmental subdivision, failure to file a timely notice of claim did not bar the action.[55]

A former high school student in Georgia sued her private school and a teacher under title IX and state law for sexual abuse. The Eleventh Circuit affirmed that while title IX was applicable because the school's tax-exempt status constituted federal financial assistance, the suit was properly barred as not being filed in a timely manner since it was more than eight years after the former student reached the age of majority, at which time her claim became subject to a two year limitation period.[56]

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[52] More v. General Brown Cent. Sch. Dist., 691 N.Y.S.2d 850 [136 Educ. L. Rep. 531] (N.Y. App. Div. 1999).

[53] Scuteri v. Watkins Glen Cent. Sch. Dist., 689 N.Y.S.2d 751 [135 Educ. L. Rep. 577] (N.Y. App. Div. 1999).

[54] Gamoneda v. New York City Bd. of Educ., 687 N.Y.S.2d 46 [134 Educ. L. Rep. 277] (N.Y. App. Div. 1999).

[55] Miller v. Mauston Sch. Dist, CESA-V, 588 N.W.2d 305 [131 Educ. L. Rep. 1106] (Wis. Ct. App. 1998).

[56] M.H.D. v. Westminster Schs., 172 F.3d 797 [133 Educ. L. Rep. 774] (11th Cir. 1999).

A former student unsuccessfully filed a sexual abuse suit against his teacher and district when his claim was not filed within the one year statute of limitations. The Supreme Court of Utah affirmed that a four year limitations period was inapplicable as there were no exceptional circumstances that would have justified such an extension, because the former student had more than sufficient time to commence an action after reaching the age of majority.[57]

In Nebraska, a motorist who was injured in a collision with a school district-owned vehicle challenged the denial of her personal injury claim as untimely. An appellate court affirmed that a letter from the motorist's attorney did not comply with written notice requirements, and that her insurance company's solicitation of settlement discussions and requests for information did not waive the written notice requirement. Further, the court was of the opinion that the payment of personal property claims did not stop the district from later arguing that personal injury claims were time barred.[58]

Where a child in Mississippi was injured in a playground accident, his parents were contacted by the school's liability insurer who gave them a claim number for future reference. Three weeks later, the parents gave written notice of the claim to the insurer with a statement that he accepted notice on behalf of the district. Approximately nine months later, the parents filed a complaint alleging that their son's injuries were a result of inadequate supervision by district employees and negligent maintenance of school grounds. An appellate court affirmed a grant of summary judgment in favor of the district since it was not satisfied that the letter constituted strict notice compliance with the state's Torts Claim Act.[59]

Survivors of a murder victim whose body was discovered in an elementary schoolyard sought to serve a late notice of claim against the district for the decedent's conscious pain, suffering, and a derivative claim. An appellate court in New York affirmed the denial of the estate's motion to serve late notice of claim where there was no adequate explanation for the fifteen month delay. The court rejected the estate's argument that the district was on notice through police investigations and ensuing local media reports.[60]

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[57] Burkholz v. Joyce, 972 P.2d 1235 [132 Educ. L. Rep. 1005] (Utah 1999).

[58] Keene v. Teten, 602 N.W.2d 29 [139 Educ. L. Rep. 626] (Neb. Ct. App. 1999).

[59] Watts v. LaFayette County Sch. Dist., 737 So. 2d 1019 [137 Educ. L. Rep. 418 (Miss. Ct. App. 1998).

[60] Traylor v. Comsewogue Sch. Dist., 696 N.Y.S.2d 219 [138 Educ. L. Rep. 889] (N.Y. App. Div. 1999).

A discharged teacher brought an action against the New York State Division of Human Rights for failure to serve a timely sex discrimination complaint on her school district. The Court of Claims agreed that the teacher's charge was without merit as it was her duty to ensure compliance with the requirements of state law relating to the presentation of her claim.[61]

In a third case from New York, an individual who was injured while working on the roof of a school district-owned building was denied the opportunity to file a late notice of claim. An appellate court in New York affirmed that the claim was properly denied since the district had no knowledge of the underlying facts within the ninety days after it arose or within a reasonable time thereafter. The court also held that because the worker failed to establish a reasonable excuse for his failure to serve timely notice, acceptance of it would have unfairly prejudiced the district.[62]

A student sued her district for injuries she received when she fell through a stage during rehearsal for a school play. An appellate court in Ohio affirmed that the suit was untimely because even though the accident occurred when the student was a minor, she failed to file a claim within two years after reaching eighteen.[63]

Educational Malpractice

A student in New York who was suspended from school for five days filed an educational malpractice claim against his district. An appellate court affirmed a grant of summary judgment in favor of the district on the basis that it could not entertain a claim for educational malpractice.[64]

In another case, parents of children who attended an elementary school filed an educational malpractice suit against the principal for imposing a teaching method that emphasized social skills at the expense of discipline and academics. The parents claimed the approach created an atmosphere of chaos, disruptiveness, and violence at the school. An appellate tribunal in Connecticut rejected the claim because it was based in tort rather than institutional breach of contract, a claim that courts there have recognized.[65]

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[61] McCann v. State of New York, 694 N.Y.S.2d 328 [137 Educ. L. Rep. 354] (N.Y. Ct. Cl. 1999).

[62] Jones v. Jamestown Pub. Sch. Dist., 688 N.Y.S.2d 332 [134 Educ. L. Rep. 555] (N.Y. App. Div. 1999). *But see* Shue v. Red Creek Cent. Sch. Dist., 697 N.Y.S.2d 437 [139 Educ. L. Rep. 576] (N.Y. App. Div. 1999) (upholding an award for a worker who was killed when he fell through a school roof).

[63] Looman v. Bell-Heron Middle Sch., 716 N.E.2d 1197 [137 Educ. L. Rep. 1100] (Ohio Ct. App. 1999).

[64] Livolsi v. Hicksville Union-Free Sch. Dist., 693 N.Y.S.2d 617 [137 Educ. L. Rep. 330] (N.Y. App. Div. 1999).

[65] Bell v. Board of Educ. of the City of West Haven, 739 A.2d 321 [139 Educ. L. Rep. 538] (Conn. Ct. App. 1999).

Liability Insurance

After a student who was sexually assaulted by his teacher settled claims of negligent hiring, supervision, and retention against his school district, he sued its errors and omissions insurer. An appellate court in Minnesota upheld the policy's exclusions for claims arising out of assault and battery and bodily injury coverage. In addition, the court posited that the doctrine of reasonable expectations did not prohibit the exclusions.[66]

Employee Injuries

A teacher brought a negligence action against a police officer and a city for injuries she sustained when the temporary trailer in which she was teaching was struck by a city police car. According to the Supreme Court of Rhode Island, the police officer was not entitled to any deduction from damages caused by his negligence by reason of sums paid to the teacher through her disability pension.[67]

In New York, a hospital employee brought a personal injury action against a board of education when she was assaulted by a child in the hospital's day treatment program. An appellate court noted that although the board provided on-site teachers, it was not liable because it did not have custody or control of the child at the time of the assault.[68]

Workers' Compensation/Liability Insurance

A county school board challenged an award granting lost wages to an injured employee who worked both as a bus driver and teacher's aide. The Supreme Court of Virginia affirmed that even though the employee filled dissimilar positions, her earnings from both jobs were properly combined to calculate her average weekly wage.[69]

The automobile insurer of a teacher who was injured in an accident while on her way to attend a school-sponsored seminar sought reimbursement for lost wages and medical benefits paid to the educator. The Supreme

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[66] Amos v. Campbell, 593 N.W.2d 263 [134 Educ. L. Rep. 580] (Minn. Ct. App. 1999).

[67] Gelsomino v. Mendonca, 723 A.2d 300 [132 Educ. L. Rep. 156] (R.I. 1999).

[68] Meyers v. Board of Educ. of the City of New York, 688 N.Y.S.2d 623 [134 Educ. L. Rep. 995] (N.Y. App. Div. 1999).

[69] Dinwiddie County Sch. Bd. v. Cole, 520 S.E.2d 650 [139 Educ. L. Rep. 696] (Va. 1999).

Court of Michigan affirmed that the teacher was not entitled to worker's compensation because her injury did not arise out of, or occur in the course of, her employment. The court declared that even if attendance at the seminar had been an incident of her employment, the injury was not compensable because it occurred on the way to work.[70]

The Supreme Court of Michigan affirmed the coordination of worker's compensation benefits with benefits from a disability pension. The court agreed that coordination did not violate the section of the state constitution treating pension benefits granted by public authorities as contractual obligations that may not be impaired by legislative enactments.[71]

When elementary school music positions were eliminated, a teacher was assigned six to seven periods a day of four different secondary social studies classes. The teacher subsequently sought psychiatric treatment and filed a claim for workers' compensation due to a stress-related disorder he suffered because of the change. An appellate court in Oregon explained that because the stress-inducing off-duty preparation that the teacher had to perform was not generally inherent in every working situation, the mental disorder was compensable as a major contributing cause to the condition of his employment.[72]

In one case, a non-teaching school assistant challenged her award of workers' compensation benefits for stress-related injuries. An appellate court in Pennsylvania permitted the lump-sum payment of pre-injury and post-injury wages to be included in the assistant's average weekly computation.[73]

In a second case from Pennsylvania, a school aide who was exposed to fire retardant chemicals when a fire extinguisher exploded challenged her award of a closed period of time benefits on the basis that she suffered a work-related injury that rendered her incapable of performing her job. An appellate court asserted that the aide failed to establish that her injuries caused her loss of earnings since medical testimony that her allergic reactions were the result of the one accident, which was unlikely to occur again, did not support her disability claim.[74]

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[70] Camburn v. Northwest Sch. Dist., 952 N.W.2d 46 [134 Educ. L. Rep. 300] (Mich. 1999).

[71] Tyler v. Livonia, 590 N.W.2d 560 [133 Educ. L. Rep. 1016] (Mich. 1999).

[72] Whitlock v. Klamath County Sch. Dist., 974 P.2d 705 [133 Educ. L. Rep. 1040] (Or. Ct. App. 1999).

[73] Miles v. Workers' Compensation Appeal Bd., 725 A.2d 851 [133 Educ. L. Rep. 166] (Pa. Commw. Ct. 1999).

[74] School Dist. of Philadelphia, v. Worker's Compensation Appeal Bd., 727 A.2d 1171 [134 Educ. L. Rep. 222] (Pa. Commw. Ct. 1999).

A reading teacher filed a claim for workers' compensation benefits alleging that her vocal cords were injured by continuous poor ventilation in the room where she taught. An appellate court in New York agreed that the claim was not an occupational disease since it did not arise from the general nature of her employment, but was specific to the room in which she taught. At the same time, the court reversed the denial of her request for benefits since she suffered a compensable accidental injury.[75]

Defamation/Intentional Infliction of Emotional Distress

A part-time teacher in Florida won a damages award against his school board for violating state law by releasing defamatory statements about him. However, when an appellate court ascertained that since the original placement of the statements in the teacher's file and their subsequent release was one occurrence rather than two, it reduced the award consistent with a sovereign immunity judgment.[76]

The mother of a twelve-year-old middle school student sued her district for intentional infliction of emotional distress for not allowing her daughter to use a nickname. An appellate court in Oregon affirmed a grant of summary judgment in favor of the district by pointing out that the student did not have a legally protected interest in using the nickname at school. The court added that absent a physical injury, the student could not recover for negligent infliction of emotional distress, and that the district was not liable for invading her privacy based on a teacher's statements that the nickname was a street name for marijuana.[77]

Following a trip to Spain, when a teacher-chaperone wrote a letter criticizing the actions of a colleague, the latter filed a defamation action. An appellate court in New Jersey affirmed a grant of summary judgment in favor of the first teacher because there was no showing of actual injury by way of damage to reputation, emotional distress, loss of wages, or change in position.[78]

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[75] In re Leventer, 684 N.Y.S.2d 658 [132 Educ. L. Rep. 883] (N.Y. App. Div. 1999).

[76] School Bd. of Broward County v. Greene, 739 So. 2d 668 [138 Educ. L. Rep. 571] (Fla. Dist. Ct. App. 1999).

[77] Phillips v. Lincoln County Sch. Dist., 984 P.2d 947 [137 Educ. L. Rep. 1127] (Or. Ct. App. 1999).

[78] Rocci v. MacDonald-Cartier, 731 A.2d 1205 [135 Educ. L. Rep. 1003] (N.J. Sup. Ct. App. Div. 1999).

A former school board president and vice-president brought a defamation action against their superintendent for remarks he made during a board meeting to investigate the use of a district credit card. An appellate court in Texas believed that since the meeting was a quasi-judicial process, the superintendent was entitled to absolute immunity for liability for defamation.[79]

In Oregon, a school bus driver sued the parents of student passengers for defamation, intentional interference with economic relations, and intentional infliction of emotional distress after they claimed that he sexually molested children. An appellate court affirmed that the parents published false defamatory statements in an attempt to interfere with the driver's employment.[80]

In a separate case, a middle school teacher sued his school district for defamation, invasion of privacy, and negligent investigation of alleged misconduct. As the regulation governing a superintendent's filing of written complaints did not create a duty to investigate, an appellate court in Washington reasoned that the teacher could not use it as a basis for a negligent investigation claim. However, the panel remanded the teacher's invasion of privacy claim since the state Supreme Court had recently recognized the existence of a common-law right of privacy.[81]

In Pennsylvania, a school district's business manager brought a defamation action against a school board director who wrote a letter to the editor of a newspaper accusing the business manager of budgetary misconduct. An appellate court in Pennsylvania affirmed that the director was entitled to absolute immunity since she was a high public official who made the alleged defamatory statements in the course of her employment in an effort to inform the general public.[82]

In New York, a school principal unsuccessfully sued a newspaper for defamation. In examining the challenge to a reporter's investigation and the credibility of individuals who provided him with information, an appellate court affirmed that there was no evidence the allegedly defamatory statements were published with malice or that the defendant knew them to be false and published them with a reckless disregard for the truth.[83]

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[79] Gallegos v. Escalon, 993 S.W.2d 422 [135 Educ. L. Rep. 852] (Tex.Ct.App. 1999).

[80] Kraemer v. Harding, 976 P.2d 1160 [134 Educ. L. Rep. 619] (Or. Ct. App. 1999).

[81] Corbally v. Kennewick Sch. Dist., 973 P.2d 1074 [133 Educ. L. Rep. 262] (Wash. Ct. App. 1999).

[82] Matta v. Burton, 721 A.2d 1164 [131 Educ. L. Rep. 788] (Pa. Commw. Ct. 1998).

[83] Jee v. New York Post Co., 688 N.Y.S.2d 49 [134 Educ. L. Rep. 551] (N.Y. App. Div. 1999).

In a second case from New York, a high school student sued her district and a teacher for intentional infliction of emotional distress when the teacher used a racial epithet in class. An appellate court in New York affirmed that the teacher's use of an offensive racial epithet in its pedagogical context was insufficiently egregious as to support the student's claim.[84]

Constitutional Torts

This section had the largest number of reported cases with nineteen. The first thirteen cases involved allegations under title IX; the others involve a variety of constitutional claims.

Student Initiated Title IX Cases

The Supreme Court, in *Davis v. Monroe County Board of Education*,[85] ruled that a female fifth grader from Georgia who endured months of verbal and physical harassment from a male classmate may be entitled to a remedy under title IX for student-on-student sexual harassment. The student, through her mother, alleged that even though the board and school officials had actual knowledge of the harassment, they failed either to investigate or put an end to his behavior. The Court determined that the board, as a recipient of federal funds, may be liable if it acted with deliberate indifference to known acts of harassment which were so severe, pervasive, and offensive that they effectively barred the victim's access to educational opportunity. Further, the Court stated that the board and school officials could be liable where they exercised substantial control over both the harasser and the context in which the known harassment occurred. At the same time, the Court suggested that simple acts of name-calling and teasing, even when based on gender, would not provide a cause for action for sexual harassment under title IX.

In a case from New York, the Second Circuit affirmed in favor of a school district, assistant superintendent, and teacher who were sued under title IX for alleged student-on-student sexual harassment. The court agreed that the school officials had qualified immunity since they lacked actual knowledge of the harassment. The court's observation that the trial judge failed to provide the jury with a sufficiently inclusive list of individuals who had a copy of the notice of the harassment was insufficient to require a reversal in favor of the defendants.[86]

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[84] Graham v. Guilderland Cent. Sch. Dist., 681 N.Y.S.2d 831 [131 Educ. L. Rep. 820] (N.Y. App. Div. 1998).

[85] 119 S. Ct. 1661 [134 Educ. L. Rep. 477] (1999).

[86] Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749 [131 Educ. L. Rep. 593] (2nd Cir. 1998).

In Texas, the Fifth Circuit wrote that a teacher's fabrication of sexual abuse by a child's father was so shocking to the contemporary conscience that it violated substantive due process for the purposes of section 1983 liability. Insofar as the teacher's charge led to an investigation and separation of the family for a period of three years and her behavior was not objectively reasonable, the court refused to permit her to use a qualified immunity defense.[87]

When a student in Nebraska alleged the existence of a hostile environment that allowed sexual harassment to exist, she sued her district, school officials, and a teacher under section 1983 and title IX. The Eighth Circuit decreed that the student failed to make the necessary showing that school officials acted with deliberate indifference once they were on notice of the teacher's harassment. The court concluded that the teacher could not be sued in her individual capacity under title IX, but that the student could sue her individually under section 1983, alleging violations of her Fourteenth Amendment rights.[88]

A former student from South Dakota unsuccessfully filed suit under title IX alleging that she was sexually abused by a teacher thirty years earlier. The Eight Circuit affirmed that title IX did not apply retroactively despite the former student's having claimed that she did not realize the existence of a potential cause of action until more than twenty years after title IX was enacted.[89]

A mother in Utah filed a section 1983 case against her son's school and others after he was repeatedly subjected to sexual assault by a fellow student. The Tenth Circuit discerned that since the school was an arm of the state for the purposes of the Eleventh Amendment, it waived its right to avoid litigation by voluntarily becoming a party to the action. The court was convinced that while the assaults were tragic, there was no evidence of affirmative acts on the part of the principal which would have allowed a claim for the deprivation of the student's constitutional right to due process. Even so, the court refused to dismiss the claim against the principal under the danger-creation doctrine since he failed to provide adequate training for staff or adopt a policy to prevent repeated sexual assaults.[90]

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[87] Morris v. Dearborne, 181 F.3d 657 [136 Educ. L. Rep. 693] (5th Cir. 1999).

[88] Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607 [133 Educ. L. Rep. 418] (8th Cir. 1999).

[89] Gross v. Weber, 186 F.3d 1089 [137 Educ. L. Rep. 470] (8th Cir. 1999).

[90] Sutton v. Utah State Sch. for the Deaf and Blind, 173 F.3d 1226 [134 Educ. L. Rep. 697] (10th Cir. 1999).

In a case from Colorado, the mother of a high school student who had physical and mental disabilities filed suit under section 1983 and title IX when, despite her expressions of concern for her daughter's safety, she was not notified that her daughter was sexually assaulted at school. Further, school personnel told the student to forget that the events ever happened. The Tenth Circuit was satisfied that the mother presented a claim against the district under title IX for peer-to-peer sexual harassment and against the principal and teachers under section 1983 for violating her daughter's right to equal protection by allegedly refusing to remedy the sexual harassment even though they had actual knowledge of the improper conduct. The court also decided that the mother failed to allege a municipal policy or custom required to maintain an equal protection claim against the district and that the principal and teachers were not entitled to qualified immunity from the section 1983 claim.[91]

A school superintendent in Alabama challenged the denial of his motion for summary judgment in a section 1983 case involving sexual abuse of a student by her vocational education teacher. Reversing in favor of the superintendent, the Eleventh Circuit held that he was entitled to sovereign immunity in his individual capacity because even assuming that the teacher violated the student's substantive due process right not to be abused, the superintendent did not deprive her of that right. Additionally, the court offered that the superintendent was immune from the charge of failing to remedy the teacher's actions since there was no evidence that he committed any prior inappropriate acts.[92]

In Tennessee, a ten-year-old student successfully filed a title IX claim for sexual abuse by fellow students where she was assaulted twenty to thirty times and both she and her parents informed school officials of the attacks. The court refused to allow the board of education to be sued separately from the metropolitan government under state law claims.[93]

When a student and her parents sued her district and administrators for sexual harassment, the federal trial court in Massachusetts contended that remedies under title IX did not foreclose relief under section 1983. The court commented that the student's substantive due process right to bodily integrity is different from her title IX right to be in an educational environment that is free of sexual discrimination.[94]

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[91] Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238 [137 Educ. L. Rep. 474] (10th Cir. 1999).

[92] Hartley v. Parnell, 193 F.3d 1263 [139 Educ. L. Rep. 95] (11th Cir. 1999).

[93] Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp.2d 991 [132 Educ. L. Rep. 357] (M.D. Tenn. 1998).

[94] Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp.2d 114 [137 Educ. L. Rep. 611] (D. Mass. 1999).

An African-American high school student sued her district and school officials, alleging intentional infliction of emotional distress arising from a classroom incident of racial harassment. A federal trial court in California partially granted the defendants' motion to dismiss in recognizing that the district, school officials, and a teacher were entitled to statutory immunity for negligence and intentional infliction of emotional distress. The court did permit the student's title VI claim of peer-to-peer harassment to proceed based on the refusal of school officials to act in response to her repeated notification.[95]

The federal trial court in Maine partially denied a motion for summary judgment entered on behalf of a school district, superintendent, and principal where a male student claimed that he was abused by a female teacher. The court posited that there were enough facts to permit a title IX gender discrimination suit to proceed because school officials had actual notice of the teacher's behavior toward male students even if there were questions of fact as to whether they were deliberately indifferent to her actions. However, the court granted a summary judgment motion on behalf of the superintendent and principal on the section 1983 charge since the teacher was not acting under the color of state law when she harassed the student.[96]

In the final case involving title IX, an appellate court in Texas affirmed that a female middle school student whose leg was touched by a male classmate did not have a section 1983 claim against her district because she was unable to show that it had an official policy or custom permitting such behavior. The court also agreed that the student's title IX claim could not proceed since the behavior was not severe, pervasive, or offensive enough to have deprived her of any educational opportunity, and that her father's being denied the opportunity to address an open meeting of the board on the matter did not violate his rights under the First Amendment.[97]

Other Student Constitutional Claims

The mother of a student who was attacked and killed in school sued the town, educators, and municipal officials for a failure to maintain security and protect her son. The Supreme Judicial Court of Massachusetts explained that since the defendants did not create a danger when three assailants entered the school and stabbed the student, their inactivity in the face of a known danger did not create liability under section 1983. The court refused to accept the notion that school officials had a due process duty to protect the student from private actors.[98]

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[95] Davison v. Santa Barbara High Sch. Dist., 48 F. Supp.2d 1225 [136 Educ. L. Rep. 291] (C.D. Cal. 1998).

[96] Doe v. School Admin. Dist. No. 19, 66 F. Supp.2d 57 [139 Educ. L. Rep. 399] (D. Me. 1999).

[97] Mosley v. Beaumont Indep. Sch. Dist., 997 S.W.2d 934 [137 Educ. L. Rep. 404] (Tex.Ct.App. 1999).

In the first of three cases from Pennsylvania, a Native American middle school student who was assaulted at school sued the district and school personnel under sections 1983 and 1981. A federal trial court granted the defendants' motion for summary judgment in declaring that an agreement between the student's family and school officials allowing her to arrive late for class to ensure her safety did not create a special relationship or give rise to a state-created danger. The court noted that the assault on the student did not serve as a basis for a section 1983 claim absent evidence that school officials were deliberately indifferent to her plight. The court acknowledged that trouble in the student's neighborhood over her heritage did not support the section 1981 claim, and that the individual school employees were statutorily immune from liability for intentional infliction of emotional distress.[99]

A special education student brought a section 1983 action against her teacher and school district after she was raped in a classroom. A federal trial court in Pennsylvania rejected the teacher's motion to dismiss on the basis that the defendants failed to take corrective action following earlier assaults by the same perpetrators. Moreover, the court was of the view that the teacher's statement, "I don't care what you do, as long as you leave me alone"[100] helped to establish the student's claim under the theory of state-created danger.

A high school student in Pennsylvania who had been accused of truancy filed a section 1983 action against his district, principal, and school nurse alleging that they failed to assist him when he was injured by a police officer who threw him against a school wall. A federal trial court granted the defendants' motion for summary judgment in asserting that the district was not liable due to its policy or for a lack of training personnel, that the principal was not liable since she was not in school on the day that the assault occurred, and that the nurse was not deliberately indifferent to the student's injuries.[101]

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[98] Brum v. Town of Dartmouth, 704 N.E.2d 1147 [131 Educ. L. Rep. 829] (Mass. 1999).

[99] Page v. School Dist. of Philadelphia, 45 F. Supp.2d 457 [135 Educ. L. Rep. 120 (E.D. Pa. 1999).

[100] Maxwell v. School Dist. of the City of Philadelphia, 53 F. Supp.2d 787, 789 [137 Educ. L. Rep. 238] (E.D. Pa. 1999).

[101] Woodson v. City of Philadelphia, 54 F. Supp.2d 445 [137 Educ. L. Rep. 268] (E.D. Pa. 1999).

In Ohio, a sixth grade student unsuccessfully filed a section 1983 action for battery and intentional infliction of emotional distress after receiving a single blow from a paddle wielded by his teacher as punishment for disrespectful behavior. An appellate court affirmed that the punishment was reasonable since it was within the school's policy as printed in the student handbook.[102]

A student who was disciplined by being forced to sit in a small room adjacent to her choir room filed a section 1983 action against her district. A federal trial court in Arkansas granted the defendants' motion for summary judgment in pointing out that the student's due process rights were not violated, that the district and teacher were immune under her negligence claim since she was not falsely arrested, and that the state did not recognize the tort of negligent infliction of emotional distress.[103]

Employee Initiated Cases

A former assistant superintendent in New York sued his school board and others, alleging that his dismissal violated the First Amendment and his due process rights. The administrator regularly claimed that the district's lack of leadership caused students to receive below average educations. After two and one-half years, the board foll owed the superintendent's recommendation to terminate the administrator's contract. The Second Circuit reasoned that the superintendent acted reasonably in believing that he could recommend his assistant's dismissal without violating the First Amendment. The court added that the assistant superintendent's unsupported contention that he was dismissed in retaliation for speech did not give rise to a genuine issue of material fact as to the superintendent's subjective motivation, and that his unsupported speculations were insufficient to implicate his liberty interest in seeking future employment.[104]

Where a female janitor sued her school, head custodian, assistant principal, and principal, alleging sexual harassment, a federal trial court in Pennsylvania denied the defendants' motions to dismiss. According to the court, there were material issues of fact as to whether a hostile work environment was present and whether the janitor was discriminated against in retaliation for making the charges. The court also ascertained that the janitor's failure to name the assistant principal in the claim precluded a section 1983 suit against him in his individual, but not official, capacity.[105]

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[102] Campbell v. Gahanna-Jefferson Bd. of Educ., 717 N.E.2d 347 [137 Educ. L. Rep. 1104] (Ohio Ct. App. 1999).

[103] Wallace v. Bryant Sch. Dist., 46 F. Supp.2d 863 [135 Educ. L. Rep. 488] (E.D. Ark. 1999).

[104] McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272 [137 Educ. L. Rep. 505] (2nd Cir. 1999).

A former school instruction supervisor in Georgia filed suit in a sexual harassment claim under title VII and section 1983 charge against her district, superintendent, and principal. A federal trial court rejected the defendants' motions for summary judgment because there were material issues of fact as to whether the principal's actions created a hostile work environment, whether there was quid pro quo harassment when the principal conditioned a job title change on the performance of sexual favors, whether district officials knew or should have known of the harassment and failed to take action, and whether the district was vicariously liable for supervisor harassment resulting in tangible employment action. The court found that the supervisor's title VII claim was not time barred since she alleged that the one event of harassment that took place within the 180 day filing period was part of a continuous and related string of events.[106]

In Florida, a teacher sued her school board under title VII alleging the existence of a hostile work environment, sexual harassment, and failure to promote. A federal trial court in Florida was of the opinion that the teacher established a prima facie case of hostile work environment based on the principal's behavior but refused to hold the board vicariously liable for his behavior. The court determined that the teacher failed to take advantage of preventative opportunities provided by the board under its anti-harassment policy and complaint procedures.[107]

A non-teaching employee of the Maryland Board of School Commissioners sued the board alleging sexual harassment in violation of title IX. The federal trial court granted the board's motion for summary judgment because the staff member failed to show that the alleged harassment was sufficiently severe or pervasive to affect a term or condition of her employment.[108]

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[105] McLaughlin v. Rose Tree Media Sch. Dist., 52 F.Supp.2d 484 [136 Educ. L. Rep. 843] (E.D. Pa. 1999).

[106] Gibson v. Hickman, 38 F. Supp.2d 1369 (134 Educ. L. Rep. 114] (M.D. Ga. 1999).

[107] Masson v. School Bd. of Dade County, 36 F. Supp.2d 1354 [133 Educ. L. Rep. 489] (S.D. Fla. 1999).

[108] Francis v. Board of Educ. of Sch. Comm'r of Baltimore City, 32 F. Supp.2d 316 [132 Educ. L. Rep. 131] (D. Md. 1999).

Conclusion

The Supreme Court's decision in *Davis*, that a school district can be liable for student-on-student sexual harassment, is likely to lead to increased litigation in this area. School districts were somewhat less successful than in recent years with their attempts to advance immunity defenses. Courts continued to refuse to recognize educational malpractice as a cause of action.

7
SPORTS

Linda A. Sharp

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Introduction

This chapter includes cases in K-12 and higher education dealing with student-athletes and coaches as well as athletic directors, facilities, and associations. The chapter does not discuss litigation pertaining to the instruction of physical education.

Eligibility

This section contains thirteen cases: two challenge longevity rules; one pertains to recruiting; four discuss academic eligibility requirements; one addresses a transfer rule; two relate to disciplinary sanctions; one reviews membership in a high school athletic association; one examines the National Collegiate Athletic Association (NCAA) Postbaccalaureate Bylaw; and one deals with the eligibility of students who are home-schooled to participate in interscholastic athletics.

Longevity

In Oregon, the state school activities association has an eight-semester eligibility rule. Under such a rule, a student who has completed eight semesters of high school is ineligible for interscholastic sports competition. A student who was diagnosed with attention deficit disorder repeated the tenth grade due to academic problems caused by his disability. As a fifth-year senior, the student sought to play interscholastic football but was precluded from doing so by the eight-semester rule. In challenging the rule under the Americans with Disabilities Act (ADA), the federal trial court granted the student's request for a preliminary injunction, which allowed him to participate in football during his senior year. The court held that the student was "disabled" within the meaning of the ADA since he had shown that the requested waiver of the rule was a reasonable modification to accommodate his learning disability.[1] Subsequently, the association adopted a new eight-semester rule. On further review of whether the association's decision to grant or deny a waiver of the rule violated the ADA, the court indicated that a two-prong approach was appropriate: whether a student is a qualified individual with a disability; and whether a student's participation in the sport would result in undue risk to other participants or the student's team would gain an unfair competitive advantage.[2]

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[1] Bingham v. Oregon Sch. Activities Ass'n, 37 F. Supp.2d 1189 [133 Educ. L. Rep. 840] (D. Or. 1999).

A high school basketball player challenged a declaration of ineligibility for further participation because of an eight-semester rule in Indiana. According to the rule, once students enter ninth grade, they have a maximum of four fall and four spring semesters of athletic eligibility. The student was unable to complete high school within four years since he dropped out of school for a time due to his academic struggles. The state athletic association denied the student's request for a waiver of the rule pursuant to a hardship exception. A federal trial court enjoined the association from enforcing its rule and the Seventh Circuit affirmed.[3] The court agreed that a waiver of the eight-semester rule would not have resulted in fundamental alteration. The court found that waivers had been granted before and that none of the dangers motivating adoption of the rule were present. The court also observed that the student was not red-shirted, and that athletics had actually helped him to succeed academically. Finally, the court was not convinced that a waiver of the rule would have placed an undue administrative or financial burden on the association.

Recruiting

A high school sought to enjoin a state athletic association from enforcing a rule that prohibited undue influence in recruiting student-athletes on the basis that it violated the First Amendment right to free speech. The rule had been used to try to prohibit a football coach from sending letters to students who had already been admitted to another school, advising them of spring practice. A federal trial court in Tennessee granted the school's request for a permanent injunction on the basis that the rule violated the First Amendment on its face and as applied to the letter in question. The Sixth Circuit reversed, vacated, and remanded in holding that the school could not bring a section 1983 action against the association since it was not a state actor.[4]

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[2] Bingham v. Oregon Sch. Activities Ass'n, 60 F. Supp. 2d 1062 [138 Educ. L. Rep. 411] (D. Or. 1999).

[3] Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 [136 Educ. L. Rep. 713] (7th Cir. 1999).

[4] Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 180 F.3d 758 [136 Educ. L. Rep. 145] (6th Cir. 1999).

Academic Eligibility

Four cases dealt with academic eligibility, three of which challenged NCAA policies or rulings. In a case from Pennsylvania, African-American student-athletes sued the NCAA over its use of minimum cutoff scores on scholastic aptitude tests to evaluate eligibility for freshman intercollegiate competition as racially discriminatory under title VI. A federal trial court granted the student-athletes' motion for summary judgment on the ground that the NCAA was unable to rebut the presumption of discrimination by showing that the cutoff point selected was better than any other measure for furthering its legitimate purposes of increasing the graduation rates of student-athletes.[5] However, the Third Circuit reversed, not on the merits of the claim, but on the basis that the NCAA was not subject to title VI since it did not receive federal financing.[6] The court ruled that federal funding given to the NCAA's National Youth Sports Program had nothing to do with its activities regarding collegiate athletics.

A university football player challenged the NCAA over the loss of his eligibility because he had not completed the requisite number of credit hours that it required. The university filed four waiver requests on behalf of the – student-athlete, but all were denied by various bodies of the NCAA. After a trial court granted the student's request for a temporary injunction, an appellate tribunal in Texas dismissed the case as moot since he had finished his final season of eligibility.[7]

When a high school athlete from Alaska signed a letter of intent to play college basketball, she was declared ineligible for her freshman year under the NCAA requirement that student-athletes take thirteen "core courses" in high school. The student's high school principal, relying on information from the NCAA, had accepted a journalism course as a core course. Later, the NCAA sent further information declaring that journalism was not acceptable as a core course. Following numerous discussions by between high school and university personnel, the NCAA rejected the athlete's request for a waiver. A trial court granted the student athlete's request for a preliminary injunction. On further review, the Supreme Court of Montana dismissed the appeal since the injunction was mooted by the completion of the athlete's freshman year.[8]

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[5] Cureton v. National Collegiate Athletic Ass'n, 37 F. Supp. 2d 687 [133 Educ. L. Rep. 800] (E.D. Pa. 1999).

[6] Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107 [140 Educ. L. Rep. 474] (3rd Cir.1999).

[7] National Collegiate Athletic Ass'n v. Jones, 982 S.W.2d 450 [131 Educ. L. Rep. 1145] (Tex. Ct. App. 1998).

A high school student from Louisiana had been promised a basketball scholarship by a university in Texas. In order to receive the scholarship, the student had to achieve a score of 820 on the Scholastic Aptitude Test. When he took the test initially, he received a score of 700. He then enrolled in a "Testbusters" course and received a score of 1,300. Based on the large score difference, the Educational Testing Service (ETS) closely examined the scores, uncovered sufficient evidence supporting a charge that the student cheated during the test-taking process, and canceled the second score. The student unsuccessfully filed a breach of contract action against ETS for its failure to release the scores as a federal trial court in Louisiana granted its motion for summary judgment. On further review, the Fifth Circuit affirmed.[9] The court was of the opinion that since the administrator who investigated the validity of the scores did so in good faith, ETS had not breached its contract with the student. The court pointed out that in its contract, ETS clearly and explicitly reserved the right to withhold scores it had reason to believe were not valid.

Transfer

A female who was a Japanese national moved to live with her aunt and uncle in Washington in order to experience American culture. The local high school informed the student that she would be ineligible for varsity sports since the state interscholastic activities association had a rule preventing transfer students from being immediately eligible for varsity competition unless they transferred with their "entire family unit." The association also notified the student that she could not establish a "hardship" exception to the rule. After a trial court decreed that the rule violated equal protection, an appellate court agreed that a typical foreign exchange student could not meet the hardship exception.[10] In maintaining that the rule had a disparate impact on students who had different national origins or alienage and since she was a member of a suspect class, the court required the association to show that it served a compelling state interest. The court concluded that since the association was unable to meet this burden, the rule violated equal protection.

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[8] Van Troba v. Montana State Univ., 970 P.2d 1029 [131 Educ. L. Rep. 1126] (Mont. 1998).

[9] Murray v. Educational Testing Serv. , 170 F.3d 514 [133 Educ. L. Rep. 335] (5th Cir. 1999).

[10] Fusato v. Washington Interscholastic Activities Ass'n, 970 P.2d 774 [131 Educ. L. Rep. 1119] (Wash. Ct. App. 1999).

Discipline

In Illinois, a high school football player was suspended from playing his senior season because he violated the school's zero-tolerance code on alcohol use when he was found to be inebriated by local police officers at 3 a.m. outside of a convenience store. The school's activity council reviewed the suspension and was satisfied that the code had been properly applied. The student then unsuccessfully filed suit against the school, alleging that officials infringed on his due process rights. An appellate court affirmed the denial of the student's motion for a preliminary injunction, determining that the student had no protected interest in participating in football despite having the potential to obtain an athletic scholarship to college.[11] The court added that scholarship opportunities do not elevate participation into an interest protected by due process because they are mere expectancies.

A school alcohol possession policy was under scrutiny in a case from Maryland, where students were suspended from a variety of extracurricular activities including sports, other clubs, and the National Honor Society. The federal district court asserted that there was no viable federal claim since the students did not have a protected interest under the Fourteenth Amendment.[12] The court wrote that the right to participate in high school extracurricular activities is not a protected interest.

Membership in High School Athletic Associations

A parents' organization unsuccessfully sued a state high school athletic association, alleging that the reassignment of three high schools to another region for athletic competition violated their constitutional and statutory rights. The Supreme Court of Georgia affirmed a dismissal in favor of the association.[13] The court decreed that the case did not present a justiciable controversy because just as there is no right to compete in interscholastic sports, there is no right to compete in those events in a particular region.

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[11] Jordan v. O'Fallon Township High Sch. Dist. No. 203 Bd. of Educ., 706 N.E.2d 137 [133 Educ. L. Rep. 214] (Ill. App. Ct. 1999).

[12] Farver v. Board of Educ. of Carroll County, 40 F. Supp.2d 323 [134 Educ. L. Rep. 158] (D. Md. 1999).

[13] Parents Against Realignment v. Georgia High Sch. Athletic Ass'n, 516 S.E.2d 528 [136 Educ. L. Rep. 581] (Ga. 1999).

Postbaccalaureate Bylaw

A student-athlete in Pennsylvania challenged the NCAA Postbaccalaureate Bylaw, which provides that an athlete may not participate in intercollegiate athletics at a postgraduate institution other than the one from which he or she obtained his or her undergraduate degree. The plaintiff had played volleyball at her undergraduate institution and wished to continue playing during her graduate study at other institutions. The student switched schools because her alma mater did not offer the graduate programs she wished to pursue. The Third Circuit affirmed the dismissal of the student's suit against the NCAA, which alleged violations of section 1 of the Sherman Act and title IX, along with a breach of contract claim. The court also reversed in ascertaining that the allegation that the NCAA collected dues from its members who received federal funds was sufficient to raise a claim that the NCAA received federal financial assistance under title IX. On further review, in *National Collegiate Athletic Association v. Smith,*[14] the Supreme Court disagreed in explaining that entities that only benefit economically from federal assistance do not receive federal financial assistance for the purposes of title IX coverage.

Home Schooling

Parents of a child who was being home-schooled challenged his bannishment from the local junior high school's cross-country team because of the state activities association's rule that prohibits all home-schooled children, without exception, from taking part in interscholastic athletics. A trial court granted a preliminary injunction allowing the student to participate. However, the Supreme Court of Appeals of West Virginia dismissed the claim on the basis that the validity of the ban was technically moot because the student was currently enrolled in the public school system.[15]

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[14] 525 U.S. 459 [132 Educ. L. Rep. 33] (1999).

[15] Gallery v. West Va. Secondary Sch. Activities Comm'n, 518 S.E.2d 368 [137 Educ. L. Rep. 841] (W. Va. 1999).

Equality of Programs

Gender

Five cases dealt with allegations of inequity in the provision of sport programs; four were from universities and one was at a high school. Seven members of a club lacrosse team and one member of a club softball team alleged that a university in New York violated title IX in numerous ways, including its allocation of participation opportunities, unequal benefits, and unequal scholarship funding. A federal trial court granted the university's motions for summary judgment on the accommodation claim because it had continued a practice of program expansion responsive to the abilities and interest of its student body and on the equal treatment claims since none of the plaintiffs were varsity athletes. On the class certification issue, the court certified only current and future varsity lacrosse players. On further review, the Second Circuit affirmed the dismissal of the equal treatment claims. Further, the court dismissed the appeal regarding varsity lacrosse players as moot because the university instituted a varsity team. However, the court posited that the trial judge should have certified two sub-classes, one for lacrosse and another for softball. As such, the court remanded the softball issue for further proceedings.[16]

In North Carolina, a woman alleged that her university violated title IX by refusing to allow her to be a member of the football team. The woman, a high school all-state place kicker, was allowed to attend university football practice and even played in a spring intra-squad game. Yet, the woman was neither given a uniform nor allowed to play in any intercollegiate games. She had been told that she was on the team, but the head coach eventually told her that there was "no place for her on the team." A federal trial court granted the university's motion to dismiss for failure to state a claim, as it remarked that the institution had no obligation to allow the woman onto its football team under the contact sport exception in title IX.[17] On appeal, the Fourth Circuit reversed and remanded on the ground that the trial court erroneously interpreted the contact sport exception.[18] The court commented that once a university allows a member of one sex to try out for a contact sport team intended for participation by the other sex,the university is subject to the general anti-discrimination provision of the section in question. According to the court, since the university allowed the woman to try out for the football team, she raised a claim under title IX by showing that she was thereafter discriminated against and ultimately excluded from participation on the basis of gender.

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[16] Boucher v. Syracuse Univ., 164 F.3d 113 [131 Educ. L. Rep. 635] (2d Cir. 1999).

[17] Mercer v. Duke Univ., 32 F. Supp.2d 836 [132 Educ. L. Rep. 351] (M.D. N.C. 1998).

[18] Mercer v. Duke Univ., 190 F.3d 643 [138 Educ. L. Rep. 113] (4th Cir. 1999).

A challenge to the elimination of men's intercollegiate soccer and wrestling programs was at issue before a federal trial court in Illinois. A university, in attempting to meet the proportionality benchmark for title IX compliance, cut two men's teams. The plaintiffs alleged that since the programs were purposefully selected for elimination in order to increase the proportionality of athletic opportunities for women at the expense of men, the university violated title IX. The court disagreed and granted the university's motion for summary judgment on the title IX claim.[19] The court offered that nothing in title IX requires an institution to choose the method for achieving gender parity that has the least negative impact on the over-represented gender. The court acknowledged that while the university may have handled the matter poorly, its actions were not indicative of a violation of title IX. The Seventh Circuit affirmed that there cannot be a title IX violation so long as the men's participation numbers remain substantially proportionate to the undergraduate male enrollment.[20]

In response to a consent decree that required each California State University campus to achieve a proportion of female athletes within five percentage points of the proportion of female undergraduates, one school chose to adopt squad-size targets in order to comply. The men's wrestling team alleged that the policy of capping the men's rosters violated title IX. Although a federal trial court agreed that capping team size was a quota in violation of title IX, the Ninth Circuit reversed.[21] The court held that nothing barred universities from achieving title IX compliance by decreasing athletic opportunities for the overrepresented gender.

Parents of female high school students sued the state high school athletic league in Virginia, claiming that their daughters were denied equal treatment. The claims were based on the fact that certain girls' sports were played in different seasons, depending on the division in which schools compete, but the boys' seasons were uniformly scheduled regardless of division. This disparity, argued the parents, resulted in reduced opportunities for women to obtain college athletic scholarships and sometimes required female athletes who participated in multiple sports to give up one or more sports, a violation of title IX and equal protection. A federal trial court denied the league's motion to dismiss on the basis that the parents raised a claim under title IX in alleging that the league was a recipient of federal financial assistance and that the female students were subjected to discrimination in an educational program based on sex. The court later denied the plaintiffs' motion for class certification in judging that there were conflicts of interest between named plaintiffs and other members of the class as to the remedies that sought to prevent the typicality requirement of class certification from being met.[22] The court also believed that there was a strong chance that some of the girls and parents who declined to join the suit did not share the goals and interests of the named plaintiffs.

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[19] Harper v. Board of Regents, Illinois State Univ., 35 F. Supp.2d 1118 [133 Educ. L. Rep. 89} (C.D. Ill. 1999).

[20] Boulahanis v. Board of Regents, Illinois State Univ., 198 F.3d 633 [140 Educ. L. Rep. 509] (7th Cir. 1999).

[21] Neal v. Board of Trustees of the Cal. State Univ., 198 F.3d 763 (9th Cir. 1999).

Four additional cases dealt with issues of sexual harassment or abuse related to coaches and/or sport programs. A former student sued her university and football players whom she alleged raped her under title IX and the Violence Against Women Act (VAWA). A federal trial court in Virginia dismissed the claims. The Fourth Circuit reversed in part in deciding that the student alleged sufficient facts to support claims for a hostile environment under title IX and a separate claim under the VAWA. On further review, an en banc panel affirmed.[23] After a lengthy review of recent Supreme Court precedent dealing with the power conferred upon the federal government to regulate non-economic activity, the court noted that the VAWA cannot be reconciled with the principles of limited federal government upon which the United States was founded. Thus, the court contended that the section of the VAWA that creates a private right of action was not within the power of Congress under the Commerce Clause and so affirmed the dismissal of the plaintiff's claims under the VAWA.

In a case from New York, former members of a women's tennis team alleged that their coach sexually harassed them over a three-year period and that university officials knew that he had harassed student-athletes for twenty years but conspired to conduct a sham investigation to conceal his misconduct in violation of title IX. A federal trial court in New York denied the university's motion to dismiss, as it was satisfied that the complaint was sufficient to raise a claim under title IX.[24] The court discerned that the allegations met the *Gebser*[25] standard insofar as the complaint alleged actual notice by some of those who heard the charges that the coach had harassed female athletes for twenty years and conspired to conduct a sham investigation.

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[22] Alston v. Virginia High Sch. League, 184 F.R.D. 574 [134 Educ. L. Rep. 180] (W.D. Va. 1999).

[23] Brzonkala v. Virginia Polytechnic Institute and State Univ., 169 F.3d 820 [136 Educ. L. Rep. 15] (4th Cir. 1999).

The final two cases in this section deal with conduct by an athletic coach at a high school who allegedly had improper sexual contact with a variety of female students over two decades. At the time of the suits, the coach was incarcerated for felony offenses against female students, including rape, indecent assault, and battery. At least two administrators of the district had knowledge of the coach's history of sexual improprieties. In the first case, a student who alleged that the coach raped her sought compensatory and punitive damages under title IX against the district. The federal trial court in Massachusetts ruled that the board was not immune from punitive damages under title IX since the student's allegations rose to the level of ongoing egregious violations.[26] However, the court stated that title IX preempted the student's section 1983 claim wherein she alleged a deprivation of her substantive due process rights.

In the second case, the board moved to dismiss the student's section 1983 and state law claims. In contrast to the original case, which had been rendered only days earlier, the court declared that the section 1983 claims were not preempted by the title IX action.[27] Relying on precedents that allowed recovery under both title IX and section 1983 as more persuasive, the court was of the opinion that the title IX scheme is not so comprehensive that it precludes recovery under section 1983.

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[24] Ericson v. Syracuse Univ., 35 F. Supp.2d 326 [133 Educ. L. Rep. 70] (S.D. N.Y. 1999).

[25] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 [125 Educ. L. Rep. 1055] (1998).

[26] Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp.2d 66 [137 Educ. L. Rep. 246] (D. Mass. 1999).

[27] Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp.2d 114 [137 Educ. L. Rep. 611] (D. Mass. 1999).

Tort

In 1999, thirty-three tort cases involved sports. The first seven cases dealt with intentional torts. Of the remaining twenty-six negligence cases, twenty-three concerned participants and the final three involved spectators.

Intentional

Fraud

A university student on a track scholarship and her father unsuccessfully sued a university for fraud and breach of contract after she attended the school for one fall semester. When university officials discovered that the student was a non-qualifier under NCAA rules and revoked her financial aid, she received a bill for tuition and expenses. The plaintiffs sued the university and its officials, alleging that they acted fraudulently since their objective was to avoid the payment of a debt that arose from their own administrative error. A federal trial court in New York dismissed the case since the university enjoyed Eleventh Amendment immunity from state law claims.[28]

Sexual Battery

A former high school student alleged that a physical education teacher had a sexual relationship with her while she was a pupil in his class. The suit alleged various intentional torts against the teacher, while her claim against the school district charged vicarious liability for his conduct. A trial court granted the board's motion for summary judgment on the basis of discretionary immunity. An appellate court in Minnesota affirmed that the board's actions with regard to the method, manner, and extent of the investigation over the charges were policy decisions entitled to discretionary immunity.[29]

Defamation

In the first of two defamation actions, an athletic scout sued a school corporation and a coach for defamation. The scout alleged that the coach, in the hearing of other persons, told him that he had "undermined the girls' basketball program." At the time the statement was made, the plaintiff was employed as a scout for the girls' team and coached at a local basketball camp. After a trial court granted the defendants' motion to dismiss, an appellate court in Indiana reversed and remanded.[30] The court discussed at length the defendants' contention that the statement in question was an opinion and therefore not actionable. The court responded that just because an opinion is expressed it is not dispositive. The court pointed out that if a statement implies facts that may be proven true or false, then the statement may be actionable. In this case, wrote the court, the coach's statement implied verifiable facts about the plaintiff's performance and conduct as a basketball scout. The court, therefore, asserted that it would have been premature to dismiss the complaint merely because the statement was expressed as an opinion in a state that feels strongly about its basketball.

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[28] Adams v. Kansas State Univ., 27 F. Supp.2d 469 [131 Educ. L. Rep. 381] (S.D. N.Y. 1998).

[29] Doe v. Park Center High Sch., 592 N.W.2d 131 [134 Educ. L. Rep. 307] (Minn. Ct. App. 1999).

In New Jersey, a former athletic director brought a defamation action against a teachers' union, its employee, and coaches who complained that he engaged in sexual harassment. Female coaches who were unhappy with their treatment by the athletic director took their complaints to the union representative, who wrote two letters discussing these complaints: one to the plaintiff with copies to the superintendent and principal of the high school and one directly to the superintendent. The athletic director alleged that the letters were defamatory. A trial court denied the defendants' motion for summary judgment. On further review, an appellate court in New Jersey affirmed and remanded.[31] First, the court addressed whether the athletic director was a public official who was required to show actual malice. Based on the responsibilities of his job and his visibility in the community, the court was convinced that the athletic director was a public official. Turning to actual malice, the court indicated that it is not simply hostility; rather, actual malice means that the statements made were false or that the letters were written in reckless disregard of truth or falsity. The panel found that the trial court erred when it interpreted statements made by a union representative who said "We got him. I got it to the press, forget the fliers. He's finished," as sufficient to show actual malice. As such, the court remanded for further discovery on the question of actual malice.

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[30] McQueen v. Fayette County Sch. Corp., 711 N.E.2d 62 [135 Educ. L. Rep. 589] (Ind. Ct. App. 1999).

[31] Standridge v. Ramey, 733 A.2d 1197 [136 Educ. L. Rep. 969] (N.J. Super. Ct. App. Div. 1999).

Corporal Punishment

A student sued a high school principal and a football coach for a wrist injury that he sustained while he was being disciplined for the prank of setting fire to a football field. The coach, who disciplined the student at the direction of the principal, instructed the student to cut weeds under the bleachers with "rusty old" household scissors. After the student worked for over an hour, he allegedly suffered blisters and a swollen wrist before seeking emergency room treatment. The student also claimed that the coach made fun of him when he came to school wearing a prescribed wrist brace. A trial court granted the defendants' motion for summary judgment based on immunity. An appellate court reversed in determining that there was a genuine issue of material fact as to whether the coach acted with actual malice, which would have removed his shield of immunity.[32] The court added that evidence had been presented, which, if believed, would show that the coach previously bullied the student. On further review, the Supreme Court of Georgia reversed in explaining that ill will does not equate to actual malice.[33] The court concluded that actual malice requires a deliberate intention to do wrong and it was not alleged that the coach behaved with an actual intent to cause injury.

Section 1983

When a student attempted suicide after she was sent to a locker room because she misbehaved in class, her parents sued the board of education and her physical education teacher under section 1983. The parents alleged that the teacher, who knew that the student had undergone trauma due to a rape incident, should not have sent her alone and unsupervised when he knew that she was despondent or distressed. The parents also pointed to the fact that seven other students in the school had attempted suicide in the three months prior to this incident. Based on these facts, the parents claimed that the teacher's action deprived their daughter of her Fourteenth Amendment rights to life and physical safety. The federal trial court in Maine dismissed the complaint and the First Circuit affirmed that there was no section 1983 action since a school's failure to act to protect a student is generally not a substantive due process violation.[34]

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[32] Hazelwood v. Adams, 510 S.E.2d 147 [132 Educ. L. Rep. 227] (Ga. Ct. App. 1998).

[33] Adams v. Hazelwood, 520 S.E2d 896 [139 Educ. L. Rep. 700] (Ga. 1999).

[34] Hasenfus v. La Jeunesse, 175 F.3d 68 [134 Educ. L. Rep. 826] (1st Cir. 1999).

In Texas, a high school football player died from heat exhaustion during the first day of practice, which consisted of more than four hours of intense activity in high heat and humidity. His parents brought a section 1983 action against the board, coaches, trainer, and other officials, alleging that they violated their son's rights to life, liberty, health, safety, and bodily integrity. In light of the egregious facts alleged in the complaint, which showed a complete disregard for the player's need for medical attention, a federal trial court allowed the parents to proceed with their action. However, the court thereafter granted the parties joint motion to vacate the earlier opinion on the ground that significant allegations in the complaint were false and without factual basis.[35]

Negligence

Participants

The first of two cases dealing with whether a duty of care was owed arose when a nine-year-old student in Louisiana was seriously injured when she was hit by a car as she tried to cross a busy four-lane highway while walking home from school after staying to practice with the elementary school drill team. The child's guardians unsuccessfully filed suit against the board alleging that it was negligent in its supervision of students following after-school activities and in releasing them to walk home alone, despite the fact that crossing guards had left their posts. An appellate court affirmed a grant of summary judgment in favor of the board.[36] The court ascertained that the board did not owe the child a duty of care in this circumstance because her guardian had instructed her to walk home as usual and there was no duty to post crossing guards at the highway for children who stayed on campus after regular class hours for extracurricular activities.

In a suit against a co-participant, a high school wrestler alleged that he contracted the herpes simplex virus from a former team member who had wounds, blisters, and/or rashes on his head and face when they wrestled together. A trial court in New York denied the defendant's motion to dismiss for failure to state a cause of action, as it reasoned that the allegations in the complaint stated a cause of action for negligent transmission of a disease.[37] The court posited that a duty to disclose is present when a defendant knows or should know that he has a communicable disease and that since wrestling requires participants to be in very close contact with each other, it is reasonable to impose a duty upon its participants to disclose the existence of serious communicable diseases.

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[35] Roventini v. Pasadena Indep. Sch. Dist., 183 F.R.D. 500 [132 Educ. L. Rep. 814] (S.D. Tex. 1998).

[36] Jackson v. Colvin, 732 So. 2d 530 [135 Educ. L. Rep. 296] (La. Ct. App. 1998).

[37] Silver v. Levittown Union Free Sch. Dist., 692 N.Y.S.2d 886 [136 Educ. L. Rep. 1025] (N.Y. Sup. Ct. 1999).

Five cases addressed whether a breach of duty occurred. In the first, an elementary school student was injured during a basketball practice on an outdoor concrete court as the coach participated in the scrimmage. During the scrimmage, the coach, while going for a loose ball, bumped or pushed another player, who fell onto the plaintiff, breaking his leg. In the case against the coach and the school board, the student alleged that the coach breached a duty of care by participating in the scrimmage and attempting to retrieve the loose ball. A trial court entered a judgment for the plaintiff for over $50,000. On further review, an appellate court in Louisiana reversed.[38] The court was of the view that the record failed to establish that the coach's conduct in attempting to recover the loose ball presented any greater risk of injury to the student than playing basketball typically poses since the sportinvolves physical contact. The coach's actions, continued the court, did not constitute a breach of his duty to supervise his players and to protect them from foreseeable harm.

In Indiana, a high school cheer squad member was injured during a fundraising event in a store parking lot when a car parked on an incline rolled into her. The injured student brought a negligence action against the motorist and against the school corporation, alleging that her cheerleader coach negligently supervised the event. An appellate court in Indiana affirmed a grant of summary judgment in favor of the school corporation and coach.[39] In response to the allegation that the coach should have blocked off an area in the parking lot where the fundraising activity (window washing) could be safely conducted, the court remarked that under no set of facts could it be said that the coach breached her duty of reasonable care. No interpretation of the facts, maintained the court, could give rise to the inference that had the coach supervised the event differently, the car would not have rolled down the incline and struck the student.

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[38] Prejean v. East Baton Rouge Parish Sch. Bd., 729 So. 2d 686 [134 Educ. L. Rep. 402] (La. Ct. App. 1999).

[39] Ashcraft v. Northeast Sullivan County Sch. Corp., 706 N.E.2d 1101 [132 Educ. L. Rep. 897] (Ind. Ct. App. 1999).

When a child with a genetic connective tissue disorder was injured by anther student during outdoor recess, she sued the other child who, in turn, filed a third-party complaint against the board. A trial court denied the defendant student's motion for summary judgment but granted the district's motion to dismiss the third-party complaint. An appellate court in New York affirmed that the case against the board had been properly dismissed, since school officials had a physician's approval for the injured child to participate in all activities, including athletics, and she failed to provide evidence that they failed to use reasonable care in protecting her from unassumed, concealed, or unreasonably increased risks by allowing her to take part in outdoor recess.[40]

In another co-participant case, a high school soccer player was injured by an opponent during a game as the latter, in trying to execute a slide tackle, made contact with the plaintiff's leg, breaking her fibula and tibia. The student filed suit against the opposing player, coach, and their district on the theory of recklessness. A trial court granted the defendants' motion for summary judgment and dismissed the remaining claims as moot. An appellate court in Ohio affirmed that even though the player may have violated the rules of the game, a player's risk of having her legs taken out from under her was not unreasonable in light of the foreseeable conduct of a soccer game.[41]

A case from Louisiana dealt with a school board's duty to ensure that student athletes had insurance or signed an insurance waiver form before being allowed to play. A high school football player who suffered a severely broken hip and leg while attempting a tackle was transported to a hospital, but he was not admitted because he did not have medical insurance. Three hours later, the injured player was sent to another hospital for treatment. A trial court did not think that school officials were negligent regarding the original injury. However, the court contended that officials were liable for damages related to their failure to ensure that the student had insurance coverage to include his father's emotional distress during the time that the student, while in great pain, was not admitted to the first hospital. An appellate court affirmed generally but did not do so regarding the father's damages for emotional distress.[42] The court acknowledged that coaches should not knowingly allow students to play who have neither applied for a school's insurance nor completed a waiver. School officials, continued the court, breached their duty to ensure that the player had insurance or had signed a waiver and so breached their duty when he was permitted to play even after he told the coach he had not completed the form. The lengthy delay at the hospital, discerned the court, was a direct result of not having insurance and could have been prevented had he been insured.

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[40] Pacella v. Masone, 691 N.Y.S.2d 557 [136 Educ. L. Rep. 529] (N.Y. App. Div. 1999).

[41] Bentley v. Cuyahoga Falls Bd. of Educ., 709 N.E.2d 1241 [134 Educ. L. Rep. 557] (Ohio Ct. App. 1998).

[42] Williams v. East Baton Rouge Parish Sch. Bd., 723 So. 2d 1093 [131 Educ. L. Rep. 1178] (La. Ct. App. 1998).

In the first of two negligent supervision cases, a female high school student was sexually assaulted in a girls' bathroom in the school gymnasium by an educably mentally handicapped sixteen-year-old student. The assault victim and her mother sued the school board, alleging that the incident occurred because the coach, who was supposed to be supervising the special education students, left them unsupervised in the gymnasium, thus allowing the assault to occur. A trial court entered judgment in favor of the student but was reversed and remanded on appeal. The Supreme Court of South Carolina affirmed with modifications.[43] The court observed that evidence of the student's consent was admissible as to the question of damages but was inadmissible on the issue of liability.

In an intramural soccer game at a state university, a player who was injured when hit in the jaw by an opponent claimed that just before the altercation there was escalating roughness including incidents of uncalled fouls, pushing, and shoving that were not corrected by the referees. In his suit against the university, the injured player unsuccessfully charged that the officials negligently supervised the game. An appellate court in California affirmed a grant of summary judgment in favor of the university.[44] The court declared that since the university did not have a special relationship with the intramural participants, it did not have a duty to protect the injured player from the criminal acts of third persons.

Four cases had immunity as the focal point. A student who was injured while participating in an elementary school basketball game alleged that she was hurt because the referees, employees of a school district or town, allowed the contest to get out of control. A trial court denied defendants' motion to dismiss. The Supreme Court of New Hampshire affirmed in part, reversed in part, and remanded.[45] The court, in discussing the application of discretionary function immunity, ruled that the defendants' behavior regarding the training and supervision of coaches and referees was entitled to immunity since it involved a high degree of discretion in planning. Even so, the court judged that decisions made by coaches and referees in the course of a game, while involving some discretion, were not entitled to immunity because they did not involve municipal planning and public policy.

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[43] Doe ex rel. Roe v. Orangeburg County Sch. Dist. No.2, 518 S.E.2d 259 [137 Educ. L. Rep. 837] (S.C. 1999).

[44] Ochoa v. California State Univ., Sacramento, 85 Cal.Rptr. 2d 768 [134 Educ. L. Rep. 977] (Cal. Ct. App. 1999).

[45] Hacking v. Town of Belmont, 736 A.2d 1229 [137 Educ. L. Rep. 1052] (N.H. 1999).

A female student was raped in a high school locker room by a trespasser, even though three employees saw the stranger coming out of, or near, the locker room, and no one reported the incident or took steps to have him removed from the premises because the district did not have a policy covering this type of security breach. A trial court denied the board's motion for summary judgment, and an appellate panel agreed that the high school's lack of a security policy was not a discretionary act entitling it to immunity. On further review, the Supreme Court of Minnesota affirmed in part, reversed in part, and remanded. On remand, a trial court again denied the district's motion for summary judgment. An appellate court affirmed that although the school employees who noticed the intruder were entitled to immunity, the board was not entitled to vicarious immunity.[46] The court held that extending vicarious official immunity to the board would have rewarded it for its failure to develop and implement a basic security policy for use under these circumstances.

In Florida, a school secretary who was injured when a physical education teacher tossed a football to her as he was leaving the building unsuccessfully filed suit against him. The teacher called the secretary's name as he tossed her the ball but it hit her on her jaw and upper chest. There was no evidence that the teacher intentionally threw the ball at the secretary's head, and he was dismayed when the ball hit her. An appellate court in Florida affirmed a grant of summary judgment in favor of the teacher.[47] The court agreed that the act of tossing the football was not willful and wanton conduct outside the teacher's state-employee immunity.

A case from Texas dealing with financial loss involved a plaintiff who opened a health center on a university campus where students were required to pay a fee each semester for its use. Non-students were also allowed to use the facility for a fee. When the plaintiff suffered a decrease in revenues, he unsuccessfully filed suit under the state Torts Claims Act, alleging that university officials were negligent insofar as they did not conduct a market analysis in order to calculate the fee structure for usage. The plaintiff further charged that this was a negligent use of the university's personal and real property, which caused him financial injury. An appellate court affirmed a dismissal in favor of the university.[48] First, the court was of the opinion that the university's allowing the health club to open on campus was a governmental and not a proprietary function. Second, the court indicated that the Tort Claims Act was inapplicable since the loss suffered by the plaintiff was a financial, not a personal, injury.

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[46] S.W. v. Spring Lake Park Sch. Dist. No. 16, 592 N.W.2d 870 [134 Educ. L. Rep. 566] (Minn. Ct. App. 1999).

[47] Castellano v. Raynor, 725 So. 2d 1197 [133 Educ. L. Rep. 273] (Fla. Dist. Ct. App. 1999).

In the first of three cases dealing with the defense of assumption of risk, a college baseball player severely injured his knee when he stepped into a divot or hole in the school's baseball field as he attempted to catch a fly ball. In response to the player's negligence suit, the university responded that it did not owe the player a duty of care since he assumed the risks associated with playing baseball. A trial court granted the university's motion for summary judgment. On further review, an appellate court affirmed that since the player was aware of the depressions in the field before the game began and knowingly and voluntarily proceeded in the face of an obvious danger, he assumed the risk.[49]

A cheerleader hurt her thumb while practicing a maneuver that she had completed many times before. She had been assigned a spotterand the team was being supervised by the coach. A trial court dismissed the cheerleader's negligence action against the school district, and an appellate panel in New York affirmed.[50] The court was of the view that the cheerleader assumed the risk of participation, including the risk that she might fall onto the hard floor where the team was practicing.

An eleven-year-old was injured in a gymnasium during recess while voluntarily participating in an organized relay race that was supervised by three teachers' aides. While running, the student tripped, striking the wall of the stage and hitting her face, head, and right leg. In response to the student's negligence suit, the school board argued that she assumed the risk. A trial court in New York denied the board's motion for summary judgment since it believed that there were genuine issues of material fact as to whether the race organizers increased the risks and whether the students were capable of recognizing the increased risks.[51]

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[48] Hencerling v. Texas A&M Univ., 986 S.W.2d 373 [133 Educ. L. Rep. 270] (Tex. Ct. App. 1999).

[49] Zachardy v. Geneva College, 733 A.2d 648 [136 Educ. L. Rep. 943] (Pa. Super. Ct. 1999).

[50] Fisher v. Syosset Cent. Sch. Dist., 694 N.Y.S.2d 691 [137 Educ. L. Rep. 761] (N.Y. App. Div. 1999).

A second-grader was killed when a soccer goal fell on him during recess. The goals, which weighed 310 pounds, were unanchored, and two students had been injured by them in previous incidents. In the wrongful death action against the school board, the administrator of the student's estate claimed that the board negligently failed to maintain its grounds in a safe and reasonable condition. A jury returned a verdict for the estate in the amount of $925,000, which the trial court abated to $150,000. Subsequently, the Supreme Court of New Hampshire affirmed in part and reversed in part.[52] The court reversed in noting that the trial judge erred in reducing the verdict to $150,000 as a statutory limit recoverable against a governmental unit, since the district had an insurance policy with a $1,000,000 limit. The court offered that the board was liable up to the limit of its insurance policy.

In the first of three cases dealing with the applicability of the recreational users statutes, a student in Kansas broke his forearm while using a springboard in a school gymnasium. The student, after his required physical education class, was using the springboard with the teacher's permission to touch the rim of a basketball goal. After being injured, the student sued the board, alleging that his teacher was negligent or grossly negligent, even though others had performed this activity for twenty years without injury. An appellate court affirmed a grant of summary judgment for the board on the basis of immunity under the Kansas Tort Claims Act.[53] In focusing on the recreational use exception to liability under the Act, the court rejected the student's argument that it should not have been applicable since the gymnasium should not have been considered public property used as a park, playground, or open area for recreational purposes. The court was satisfied first, that a facility need not be open to the public 100% of the time to qualify as public property. Second, the court determined that an open area for recreational purposes is not limited to outdoor recreation. The court explained that if the legislature had wished to limit the applicability of this language to activities taking place out of doors, it would have done so within the terms of the statute.

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[51] Blanco v. Elmont Union Free Sch. Dist., 687 N.Y.S.2d 235 [134 Educ. L. Rep. 280] (N.Y. Sup. Ct. 1999).

[52] Marcotte v. Timberlane/Hampstead Sch. Dist., 733 A.2d 394 [136 Educ. L. Rep. 914] (N.H. 1999).

[53] Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick County, Kan., 979 P.2d 151 [135 Educ. L. Rep. 828] (Kan. Ct. App. 1999).

A parent volunteer who was working on a "slide-for-life" sued a school board and the operator of a recreational camp after she was injured. A trial court entered a judgment in favor of the parent, but an appellate tribunal reversed in favor of the defendants. On further review, the Supreme Court of Nebraska affirmed in part, reversed in part, and remanded with directions.[54] The court interpreted the provisions of the Recreation Liability Act and decreed that the section pertaining to a rent-paid exception to its definition of a charge was unconstitutionally vague. With this section stricken, the court posited that money paid to the camp operator removed the operator from the Act's protection because a landowner who charges for the use of the land is not protected by the Act. The court, therefore, reinstated the judgment against the camp operator. The court affirmed that the board was subject to common-law since it did not make the land open to the public. However, the court concluded that the board, as a temporary lessee, did not owe the volunteer a duty to inspect for or warn of latent defects in the safety equipment used with the slide-for-life.

In Arizona, a university student was injured at a student-sponsored event on a carnival-type activity, a jumping apparatus that combined a trampoline and a bungee cord. While doing maneuvers on the apparatus, the student collided with the trampoline frame and was seriously injured. In his suit against the university, the student alleged that it was liable for permitting this inherently dangerous activity. A trial court granted the university's motion for summary judgment under the provisions of the state recreational use statute. On further review, an appellate court reversed and remanded.[55] According to the court, the legislature would not have expected the commercial apparatus used here to fall within the definition of premises used within the act. The intent of the act, continued the court, was to encourage the use of outdoor, open spaces for recreation, not to immunize the use of commercial enterprise on land. Insofar as this case dealt with a form of recreation not typically conducted in the true outdoors, the court was convinced that there was no immunity under the recreational use statute.

One case dealt with the validity of a release. A university hockey player who suffered dehydration during a race unsuccessfully sued his university and the race sponsor. The Supreme Court of North Dakota affirmed.[56] Even though the student signed a release contained in the race registration form, he argued that it was not enforceable because it was not supported by consideration. The court disagreed, finding that the race sponsor allowed the player to run on the course during the road race, which was consideration for the release. Further, the court asserted that the release was not ambiguous, since it clearly evidenced an intent to exonerate the race sponsor from liability for injuries incurred by students due to participation in the race.

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[54] Teters v. Scottsbluff Pub. Sch., 592 N.W.2d 155 [134 Educ. L. Rep. 313] (Neb. 1999).

[55] Smith v. Arizona Bd. of Regents, 986 P.2d 247 [138 Educ. L. Rep. 937] (Ariz. Ct. App. 1999).

Finally, there were two playground cases. When a child's foot was caught in a staircase riser on playground equipment located at a school, her mother unsuccessfully sued the board and the architects who designed the equipment. An appellate court in New York affirmed the dismissal in favor of the defendants, as it ascertained that the equipment was not inherently dangerous for its intended use.[57]

In Mississippi, where a child was injured in a playground accident during recess, his parents communicated with the school's liability insurance administrator but never filed the statutory notice required under the state Tort Claims Act. Therefore, a trial court granted the board's motion for summary judgment and an appellate tribunal affirmed.[58] The court refused to adopt a substantial compliance standard with the statutory notice requirements, as it reflected thatstrict compliance was necessary since the law was unambiguous.

Spectators

A spectator sued a school board after she was injured at a school-sponsored football game when the bleachers broke under her as she was leaving. A trial court, affirmed by an appellate tribunal, allowed the board to use the recreational use statute as a defense. On further review, the Supreme Court of Wisconsin reversed and remanded.[59] At issue before the court was whether the plaintiff's injury fell within the statutory exception to the definition of recreational activity. The statute provides that recreational activity does not include any organized team sport activity sponsored by the owner of the property on which it takes place. The lower courts had construed the organized team sport exception not to extend to a spectator at such an event. The high court disagreed with this interpretation and wrote that it was necessary to examine the plaintiff's reason for being on the property and attending the activity that took place. In other words, stated the court, the plaintiff was not sitting on the bleachers to watch a sunset; rather, she was watching an organized team sport, an activity that is excepted as a recreational activity. Nothing in the statute, declared the court, limits the exception to players.

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[56] Reed v. University of N.D. , 589 N.W.2d 880 [132 Educ. L. Rep. 928] (N.D. 1999).

[57] Belkin v. Middle Country Cent. Sch. Dist., 691 N.Y.S.2d 84 [136 Educ. L. Rep. 511] (N.Y. App. Div. 1999).

[58] Watts v. Lafayette County Sch. Dist., 737 So. 2d 1019 [137 Educ. L. Rep. 418] (Miss. Ct. App. 1998).

[59] Meyer v. School Dist. of Colby, 595 N.W.2d 339 [135 Educ. L. Rep. 810] (Wis. 1999).

In another football situation, an end-zone spectator in a university stadium was injured by other spectators as they lunged for a football which had not been caught by the goalpost net. The spectator argued that the university owed her a duty to protect her from this type of injury because the net only caught about 50% of the balls that were kicked. Further, the plaintiff argued that university ushers were well aware of the scrambles that ensued after balls but made no attempt to curb this behavior. A trial court granted the university's motion for summary judgment. On further review, an appellate court in Indiana reversed.[60] Using the totality of circumstances analysis, the court was of the view that the university should have foreseen that injuries were likely based on the actions of third parties who lunged for footballs after they landed in a seating area. In light of the above, the court held that the university had a duty to take reasonable steps to protect the spectator from the type of injury that she suffered.

A student in Louisiana who attended a soccer match between schools was injured when he hit a rope that had been strung across a walkway behind the bleachers. A trial court granted a school's motion for summary judgment and an appellate court affirmed.[61] The court reasoned that under the terms of its lease, the school did not have the requisite control of the premises on which to impose premises liability. The court added that the school did not have the duty to inspect the premises for defects.

Employment

Thirteen cases dealt with employment issues. Six concerned contract disputes; two dealt with collective bargaining and labor relations; two related to discrimination; two involved the First Amendment; and one addressed whistleblowing.

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[60] Hayden v. University of Notre Dame, 716 N.E.2d 603 [137 Educ. L. Rep. 783] (Ind. Ct. App. 1999).

[61] Chaplain v. American Empire Surplus Lines Ins. Co., 731 So. 2d 973 [135 Educ. L. Rep. 279] (La. Ct. App. 1999).

Contract Disputes

In the first of two contract disputes involving university coaches, an assistant basketball coach in New Mexico alleged that the termination of his employment violated his due process rights and breached his implied contract. He also brought a section 1983 action against the athletic director who fired him. While the contract claim was scheduled to be adjudicated before a jury, a trial court denied the athletic director's motion for summary judgment based on qualified immunity on the section 1983 claim. On further review, an appellate court reversed and remanded.[62] At issue before the court was whether the athletic director, in summarily terminating the coach's employment, violated clearly established law of which an objectively reasonable official in his position would have been aware. The court commented that the coach had to show that under the facts of this case he, by virtue of the university's employment manual, had a clearly established right to continued employment, thus necessitating a due process hearing before he could be dismissed. Insofar as there was a clear factual dispute as to whether the coach was a probationary employee or whether he gained the status of non-probationary employee who could only be discharged for cause and with due process, the court judged that the athletic director could not reasonably have known that he was violating the plaintiff's due process rights when he discharged him summarily. Therefore, the court contended that the athletic director retained qualified immunity.

The interpretation and enforceability of a liquidated damages provision was at issue in a case from Tennessee where a university football coach breached his employment contract by leaving prematurely to coach another team. The university brought a breach of contract action against the coach, seeking to enforce the liquidated damages provision in his contract. The coach argued that the provision should have been unenforceable as a penalty clause. A federal trial court granted the university's motion for summary judgment and the Sixth Circuit affirmed.[63] The court agreed that the liquidated damages provision was not a penalty since the amount specified was reasonable in relation to the anticipated damages for breach of contract. The court also acknowledged that both parties understood at the time the contract was entered into that the coach's resignation would result in damages to the university beyond the simple cost of hiring a replacement.

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[62] Cockrell v. Board of Regents of N.M. State Univ., 983 P.2d 427 [137 Educ. L. Rep. 828] (N.M. Ct. App. 1999).

[63] Vanderbilt Univ. v. DiNardo, 174 F.3d 751 [134 Educ. L. Rep. 766] (6th Cir. 1999).

Two cases dealt with the provisions of the Teacher Fair Dismissal Act in Arkansas. In the first, a physical education teacher sought to compel a school board to renew his coaching contract. Even though the plaintiff had coached for thirteen years, the board tendered him a contract that reassigned him to the position of Alternative School Director and Teacher with no coaching duties. The board unsuccessfully claimed that it had the right to reassign the coach without triggering the provisions of the Teacher Fair Dismissal Act. The Supreme Court of Arkansas affirmed that the removal of the coaching supplement language in the contract did not merely curtail the plaintiff's coaching duties.[64] The court ruled that the board acted improperly because the plaintiff's coaching duties were eliminated and he was reassigned to a completely new administrative position that fell outside of the teaching duties that were subject to assignment by the Superintendent. The court pointed out that the board's actions constituted a nonrenewal of the contract and thus required compliance with the notice provisions of the Teacher Fair Dismissal Act.

The second case from Arkansas involved two coaches who were reassigned to other coaching duties. In one situation, a head basketball coach was reassigned to coach girls' track, and in the other, a head baseball coach was reassigned as an assistant junior-high track and football coach. Both coaches had signed contracts with the district after they were unsuccessful in their hearings before the school board. A trial court dismissed the appeal from the school board hearing. On further review, an appellate court affirmed that since superseding contracts had been signed, the requirements of the Teacher Fair Dismissal Act no longer applied.[65]

A former high school football coach in Georgia brought a section 1983 claim against the Professional Practices Commission (PPC) and two PPC administrators, claiming that they violated his due process rights in investigating allegations against him relating to grade changing that allowed an athlete to retain his eligibility to play football. This case had a long and complex history as it went up and down through the state and federal court systems a number of times. In this last decision rendered by the state appellate court, it observed that the coach received all the due process necessary in the proceedings before the PPC.[66]

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[64] Manila Sch. Dist. No. 15 v. White, 992 S.W.2d 125 [135 Educ. L. Rep. 847] (Ark. 1999).

[65] Metcalf v. Texarkana Sch. Dist., 986 S.W.2d 893 [133 Educ. L. Rep. 620] (Ark. Ct. App. 1999).

[66] Brewer v. Schacht, 509 S.E.2d 378 [131 Educ. L. Rep. 1138] (Ga. Ct. App. 1998).

In New York, a physical education teacher who had been dismissed for engaging in sexual contact with students approximately twenty-four years earlier claimed that his firing violated his due process rights. The school board took action against the teacher as soon as it received the complaints from two former students who alleged that they had been sexually abused by him two decades earlier. The teacher charged that the lapse of more than two decades was prejudicial to him in developing his defense. A federal trial court granted the board's motion for summary judgment and the Second Circuit affirmed.[67] The court agreed that the teacher was unable to show actual prejudice by the delay and that he had received appropriate procedural due process.

Collective Bargaining/Labor Relations

Athletic trainers who worked at a school district in Texas sought overtime benefits under the Fair Labor Standards Act (FLSA). The board responded that since the trainers were considered professionals under the FLSA, they were exempt from its coverage. A federal trial court indicated that the trainers were not exempt professionals. On further review, the Fifth Circuit reversed and remanded.[68] The court pointed out that since the trainers were required to obtain a university degree and to undergo specialized training in a variety of areas, they were "learned" under the first prong of the professional exemption. Second, the court remarked that the trainers consistently used their discretion and judgment in performing their work, thus meeting the second prong of the professional exemption test. The court, therefore, ordered that the board's motion for summary judgment be granted because the trainers qualified for the professional exemption under the FLSA.

In Pennsylvania, a union filed for representation as it sought to form a bargaining unit for college coaches. At issue was whether head coaches should be considered supervisors who are precluded from being in the same bargaining unit with the rank and file assistant coaches. The Labor Relations Board determined that the head coaches were not supervisors to the extent necessary to exclude them from the rank and file bargaining unit. An appellate court affirmed that since it was entirely appropriate to look at the extent to which the head coaches performed supervisory duties, it was permissible for the Board to consider such factors as the frequency, duration, and importance of the various supervisory duties they performed.[69] Based on the Board's factual findings, the court deferred to its expertise because its judgment was not arbitrary or capricious.

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[67] DeMichele v. Greenburgh Cent. Sch. Dist. No. 7, 167 F.3d 784 [132 Educ. L. Rep. 632] (2nd Cir. 1999).

[68] Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521 [137 Educ. L. Rep. 516] (5th Cir. 1999).

Discrimination

Gender

A former head coach of a university basketball team in California charged that the institution violated the Equal Pay Act (EPA) by not paying her the same compensation as the male head coach of the men's basketball team. A federal trial court granted the university's request for summary judgment and the Ninth Circuit affirmed regarding the EPA.[70] According to the court, the parties differed in their interpretation of whether the additional responsibilities borne by the male coach resulted from previous discriminatory gender-based decisions by the university. Even so, the court noted that it need not resolve that dispute because the university had raised the affirmative defense that the pay disparity was due to a factor other than sex. The university alleged that it was appropriate to pay the male coach more because he had substantially more experience and significantly superior qualifications. The court agreed that the university was able to support the pay differential and remarked that pursuant to the EEOC Notice relied upon by the coach, employers may reward professional experience and education without violating the EPA.

A female physical education teacher/coach in Alabama complained that she was not paid as much as male coaches for equivalent work. In addition, she was provided with unequal training facilities, equipment, supplies, and travel services, as well as unequal schedule times for practices and games, all of which were in violation of title IX, title VII, and the EPA. However, she signed a release that waived all potential claims regarding the disparity in the salary schedule payment when the board of education paid her approximately $7,000. Thereafter, the coach filed a charge of discrimination with the EEOC and received her Right to Sue letter. When the coach filed suit, the board responded that the signed release precluded her claims. A federal trial court denied the board's motion to dismiss the suit.[71] The court interpreted the terms of the release as limiting the scope to events in connection with the pay disparity up to and including the date the release was signed. Therefore, the court was of the opinion that the release did not cover any claims arising out of a disparity in pay thereafter, which was the subject of the current suit.

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[69] State Sys. of Higher Educ. v. Pennsylvania Labor Relations Bd., 737 A.2d 313 [137 Educ. L. Rep. 1060] (Pa. Commw. Ct. 1999).

[70] Stanley v. University of S. Cal., 178 F.3d 1069 [135 Educ. L. Rep. 917] (9th Cir. 1999).

First Amendment

A junior high school physical education teacher/coach alleged that his contract was not renewed due to retaliation for protected speech in violation of the First Amendment after a female student accused him of immoral conduct and inappropriate sexual contact. At a hearing, the school board rejected the claim that the teacher engaged in immoral conduct and renewed his teaching and coaching contract. In addition, the teacher was acquitted at a criminal trial in regard to the same incidents. Yet during the trial, the teacher, in response to questions by the prosecutor, expressed the opinion that he did not have a problem with extramarital affairs generally nor did he see that it was inappropriate to have a sexual relationship with a minor so long as she was out of school. The board became concerned about these comments and did not renew the teacher's contract for the following school year as it deemed him to have engaged in conduct prejudicial to the best interests of the school district. A federal district court in Missouri entered judgment upon a jury verdict for the teacher, but the Eighth Circuit reversed and remanded.[72] At issue on appeal was whether the compelled expression of a teacher's opinion on the propriety of a sexual relationship between a teacher and a non-student minor was entitled to First Amendment protection. The court explained that since the teacher's testimony did not relate to a disagreement with board policies and did not address a matter of public concern, it was not entitled to protection under the First Amendment.

In New York, a teacher who coached a girls' softball team was investigated by the police because he possessed candid photos of young females. The criminal investigation neither led to an arrest nor was the teacher charged criminally. When the school board became aware of the photos, it charged him with conduct unbecoming a teacher, suspended him with pay from his classroom duties, and removed him from his coaching assignment. Following a hearing, the teacher was reinstated to his classroom duties. The teacher, in his suit against the district, made a number of claims including intentional infliction of emotional distress and violations of due process and his First Amendment right to free expression. A federal trial court dismissed all of the constitutional law claims against the district.[73] As to the First Amendment claim, the court declined to reach the question of whether the photos were constitutionally protected. Rather, the court offered that there was no evidence that district officials had attempted to prohibit the teacher from taking the photos or displaying them. Further, the court was convinced that there was no evidence that the defendants sought to stifle the message that the teacher wished to communicate through the photos. The defendants, maintained the court, simply decided that, based on the nature of the photos, the teacher should have been brought up on charges of conduct unbecoming a teacher. Thus, the court concluded that there was nothing to support the claim that the teacher's First Amendment rights were abridged.

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[71] Blalock v. Dale County Bd. of Educ., 33 F. Supp. 2d 995 [132 Educ. L. Rep. 476] (M.D. Ala. 1998).

[72] Padilla v. South Harrison R-II Sch. Dist., 181 F.3d 992 [136 Educ. L. Rep. 728] (8th Cir. 1999).

Whistleblowing

In Texas, a former assistant athletic director at a university alleged that her employment was terminated because she reported violations of NCAA rules. In her suit against the university, the former assistant raised claims for breach of contract, tortious interference with contract, civil conspiracy, and a violation of the Whistleblower Act. When a trial court denied the university's plea to the jurisdiction, it took an interlocutory appeal. An appellate court ordered the dismissal of the plaintiff's claims against the university.[74] Under the Whistleblower Act, the court held that an employee must file suit within ninety days of the date of the alleged violation. Here, because the plaintiff had received a letter from the university on May 11, 1994, informing her of the university's intent to terminate her, the court decreed that she had to have filed suit within ninety days of the date of the letter. Insofar as the plaintiff did not file suit within the requisite time, the court mandated that she could not bring her claim for lack of jurisdiction. The court added that the university had sovereign immunity in regard to the common law claims.

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[73] Montefusco v. Nassau County, 39 F. Supp. 2d 231 [134 Educ. L. Rep. 127] (E.D.N.Y. 1999).

[74] University of Tex.-Pan American v. De Los Santos, 997 S.W.2d 817 [137 Educ. L. Rep. 399] (Tex. Ct. App. 1999).

Miscellaneous

Workers' Compensation

In New Jersey, a physical education teacher brought an occupational disease claim, alleging that he had contracted tonsil cancer from the secondhand smoke of his chain-smoking office mate, another teacher. The exposure had gone on for twenty-six years and the teacher had not been exposed to smoke in any other environment. A compensation judge for the Department of Labor discerned that the teacher's tonsil cancer was a compensable occupational disease, and an appellate court affirmed.[75] The court agreed that the compensation judge reasonably could have found that the cancer was caused by the secondary-smoke exposure from his co-teacher. Thus, a sufficient nexus was established, stated the court, between the teacher's occupational disease and his place of employment for purposes of the workers' compensation claim.

Open Records Act

A campus newspaper filed suit under the Maryland Public Information Act, seeking to compel the disclosure of university parking tickets accumulated by a basketball coach and his players. The university opposed the disclosure on various grounds, including the defense that, as to the students, the information contained educational records is protected from disclosure under the Family Educational Rights Privacy Act (FERPA). A trial court granted the newspaper's requests for the records. On further review, an appellate court affirmed.[76] The court reasoned that the records relating to parking tickets were not the types of records that are protected under FERPA. FERPA, declared the court, prohibits disclosure of documents relating to academic matters or to one's status as a student. It was not the statute's intent, reflected the court, to preclude the release of any record simply because it contains the name of a student.

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[75] Magaw v. Middletown Bd. of Educ., 731 A.2d 1196 [135 Educ. L. Rep. 994] (N.J. Super. Ct. App. Div. 1999).

[76] Kirwan v. The Diamondback, 721 A.2d 196 [131 Educ. L. Rep. 451] (Md. 1998).

Real Property

A landowner from New York sued a city and a school district for water damage to her property, which she alleged occurred when the latter's park property was graded and developed for a soccer field. A trial court denied the defendants' motion to dismiss. On further review, an appellate court reversed on the basis that an adjoining landowner is not liable for damage to abutting property for the flow of surface water if the improvements are made in good faith and the water is not drained by artificial means.[77]

First Amendment

In Colorado, the operator of an Internet Website sued a state university and its assistant athletic director for allegedly blocking access to information regarding athletic programs, the subject of the Website. The operator alleged that his First Amendment rights of the press were infringed because he was denied access to information that was freely provided to members of the more traditional media. The federal district court dismissed the case on the ground that the Eleventh Amendment barred the suit against the university.[78] In regard to the action against the assistant athletic director, the court ascertained that the First Amendment does not guarantee anyone, even the press, access to special information or treatment. The court ruled that since the plaintiff's speech was not actually censored, there was no First Amendment problem.

Trademark

A minor league baseball team, the Salt Lake Buzz, became embroiled in a trademark dispute with Georgia Tech, which has a yellow jacket named Buzz as its trademarked mascot. The team unsuccessfully filed suit in the federal district court in Utah, as the judge dismissed in choosing not to follow the first to file rule. The Tenth Circuit affirmed in an unpublished opinion.[79]

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[77] Condello v. Town of Irondequoit, 693 N.Y.S.2d 775 [137 Educ. L. Rep. 332] (N.Y. App. Div. 1999).

[78] Smith v. Plati, 56 F. Supp. 2d 1195 [137 Educ. L. Rep. 918] (D. Colo. 1999).

[79] Buzas Baseball, Inc. v. Board of Regents of Univ. Sys. of Ga., 189 F.3d 477 (10th Cir. 1999).

Antitrust

An athletic footwear manufacturer challenged an NCAA by-law that limited the size and location of advertising on collegiate uniforms and equipment under the Sherman Act. The federal trial court in Kansas entered judgment in favor of the NCAA on the basis that the manufacturer did not define the relevant market sufficient to support a Sherman Act claim.[80]

Conclusion

Male student-athletes continue to bring lawsuits under title IX after their teams were abolished or capped even though these cases have been overwhelmingly unsuccessful. Recreational use statute cases and interpretations of discretionary immunity provide interesting and often conflicting interpretations.

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[80] Adidas Am, Inc. v. NCAA, 64 F. Supp. 2d 1097 (D. Kan. 1999).

8

HIGHER EDUCATION

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Introduction

In *The Federalist,* No. 45, Madison argued that the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. This statement has been at the foundation of many political and legal controversies since the ratification of the Constitution in 1787 and continues to play an important role in the changing relationship between states and the federal government. During the last two years, the Supreme Court has intensified its efforts to clarify the concept of "federalism" and the role of state governments. Judging by the steady flow of delegation, the Court has made federalism a top priority. This undoubtedly explains why so many higher education cases found their way to the nation's highest court during 1999. It may also indicate why numerous Supreme Court rulings in higher education and other educational cases have subsequently played an important role in redefined state authority as it pertains to Madison's decree.

Federalism, according to the nation's highest court in *Alden v. Maine* "requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance. Immunity from suit in federal courts is not enough to preserve dignity, for the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum."[1] This decentralized judiciary approach is consistent with Hamilton's interpretation of the Constitution and sovereign immunity of states. Hamilton observed:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.[2]

Generally, the Supreme Court's reassertion of state sovereignty is good news for public colleges and universities seeking expanded immunity from punitive lawsuits. However, it leaves many unanswered queries regarding the degree to which state sovereign immunity extends and the authority of the federal government to challenge the practices of state government entities and public institutions of higher learning. This chapter carefully examines the sequence of higher education rulings that have impacted this important judicial development. Also, it presents additional case law addressing a multitude of legal concerns that emerged in 1999 including a high volume of cases in such areas as employee dismissal, equal protection, Title IX, and breach of contract.

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[1] Alden v. Maine, 527 U.S. 706, 709 (1999).

[2] The Federalist, No. 81, p. 419.

The high volume of cases during 1999 was not uncharacteristic of previous years. Despite numerous cases primarily involving employee actions against institutions, a number of high profile cases with national ramifications emerged in 1999 that were decided by state and federal supreme courts. Important court rulings addressing collective bargaining, Title IX, First Amendment, and mandatory student fees generated significant national attention among students, faculty, and administrators. In this chapter many of these high profile cases are discussed along with a variety of other cases and issues that collectively shaped the unpredictable higher education legal environment in 1999.

Intergovernmental Relationships

Authority to act can be granted in a variety of ways to a diverse group of actors. Disputes often involve questions regarding legal authority and whether individuals act within the scope of their authority. The first part of this section reports on cases involving the scope and limitations of legislative, state, and agency authority.

Legislative Authority

The five reported cases in this section involve a state statute or an interpretation of the authority of the executive or legislative branch act. In an Alabama case, the governor sought to withdraw two appointments from a board of trustees, which were approved by the Standing Committee on Confirmations but not voted on by the full Senate. The Supreme Court of Alabama affirmed that the governor did not have the power to withdraw the appointments.[3] The court held that appointments are effective until adversely acted upon by the senate and that the failure of the senate to vote was not adverse action. Therefore, the court ruled that the governor did not have the power to withdraw the appointments.

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[3] Tucker v. Watkins, 737 So. 2d 443 [137 Educ. L. Rep. 410] (Ala. 1999).

In a case from Nebraska, an administrative employee in an adult education program was denied participation in an early retirement program due to ineligibility on the basis of the program's outside funding. The employee sought a hearing, claiming that she was a teacher which required all contractual matters to be sanctioned by the board of governors. An appellate court reversed, holding that employee was not a teacher because she did not possess a teaching certificate.[4] The court added that because the early retirement program required that employees working in a position funded by an outside agency be administratively deemed eligible at the time of reappointment and that the employee was deemed ineligible, she was therefore ineligible for participation.

A discharged employee of a community college claimed wrongful discharge in violation of the Conscientious Employer Protection Act (CEPA) and the Law Against Discrimination (LAD), both of which dealt with employment discrimination. A trial court denied the college's motion for summary judgment. An appellate court in New Jersey reversed the decision holding that a prior conviction for bribery committed in the course of public employment disqualified the employee from obtaining public employment under state law, and that plaintiff therefore could not maintain an action for wrongful discharge in violation of CEPA and LAD.[5] While acknowledging the important public policies embraced by CEPA and LAD, the court observed that the circumstances of the case disproved the employee's claim.

A college president was charged with violating the Ethics in Government Act (EGA) by recommending his wife for a teaching position and hiring her on the college's behalf. The Supreme Court of Mississippi reversed the dismissal of the case and held that the president violated the act.[6] In so holding, the court interpreted the EGA as not requiring proof of damages: the EGA prohibits an officer from having an interest in a state contract authorized by a board of which he is a member, and that no such officer shall use his position to obtain pecuniary benefit for a relative. Therefore, the court wrote that the fact that the state did not suffer any damages from the wife's employment was irrelevant. Further, the court added that the wife's providing the college with a valuable service is not a defense to the violation. Additionally, the court held that good faith is not a defense to the violation, and he did not demonstrate good faith anyway, since he knew of the violations for years.

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[4] Apland v. Northeast Community College, 599 N.W.2d 233 [137 Educ. L. Rep. 796]
(Neb. Ct. App. 1999).

[5] Cedeno v. Montclair State Univ., 725 A.2d 38 [132 Educ. L. Rep. 838] (N.J. Super. Ct. App. Div. 1999).

[6] Hinds Community College Dist. v. Muse, 725 So. 2d 207 [132 Educ. L. Rep. 584] (Miss. 1998).

In New York, the legal provisions allowing the selection of regents of the state university by joint ballot in a unicameral legislature were challenged. A trial court held that such selection method was not an unconstitutional delegation of legislative power.[7] The court reasoned that first, there is a presumption that an act of the legislature is constitutional; and second, that whether sitting bicamerally or unicamerally, the senate and the assembly constitute the "Legislature" under the state constitution. The court added that this selection method did not violate the "one man, one vote" principle of the Due Process clause or the guarantee of a republican form of government.

State Authority

In one of the nation's most carefully watched cases involving the authority of state universities, the Supreme Court examined a ruling by the Supreme Court of Ohio that the state legislature violated the Equal Protection Clause by allowing state universities to change faculty workload policies while exempting those policies from collective bargaining. In an effort to address the decline in the amount of time public university professors devoted to teaching as opposed to research, the Ohio state legislature enacted a provision mandating that all public universities "shall develop standards for instructional workloads for full-time and part-time faculty in keeping with the universities' missions and with special emphasis on the undergraduate learning experience."[8] In 1994 Central State University, in accordance with the new legislative policy, adopted a workload policy and notified the local chapter of the faculty AAUP that the policy would not be negotiated. The Central State University AAUP filed suit against the university for violating collective bargaining and the Equal Protection Clause. The Supreme Court of Ohio held in favor of the plaintiffs stating that the policy deprived public university professors the equal protection of the laws.[9] However, the United States Supreme Court reversed and allowed the action of the Ohio state legislature to stand.[10] The Court held that the legislature could properly conclude that collective bargaining could interfere with the attainment of its goals pertaining to a decline in classroom time by faculty.

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[7] LaValle v. Hayden, 696 N.Y.S.2d 782 [138 Educ. L. Rep. 1125] (N.Y. Sup. Ct. 1999).

[8] Ohio Rev. Code Ann. § 3345.45 (1993).

[9] American Ass'n. of University Professors v. Central State Univ., [128 Educ. L. Rep. 1168] 83 Ohio St. 3d 229, 699 N.E. 2d 463 (Ohio 1998).

[10] Central State Univ. v. American Assn. of Univ. Professors, Central State Univ. Chapter, 119 S.Ct. 1162 [133 Educ. L. Rep. 34] (1999).

In another case concerning state authority, the board of trustees of a state medical college sought to lease its medical center to a health care corporation. Insofar as there was no statutory authority to do so, the legislature passed special legislation giving the college the power to lease its buildings. In a challenge of this authority, the Supreme Court of South Carolina reversed the trial court's decision that the board had no statutory authority to lease buildings.[11] The court reasoned that the passage of special legislation allowing the college to lease the medical center had a logical reason and a sound basis and therefore was constitutional.

A faculty member sought to recover attorney fees and costs in relation to extensive litigation regarding the right to pursue outside employment (in which the professor was awarded $1,001,925.43 in damages, which was paid by the state's liability insurance policy). A trial court awarded the professor $330,921 plus interest. The Supreme Court of Appeals of West Virginia reversed in deciding that the award of attorney fees was barred by sovereign immunity[12] The court reasoned that since the university is an agency of the state, and it is entitled to the state's immunity.

An attorney challenged the acquisition of a private medical center by a state university. As part of this action the attorney, pursuant to the state Public Records Act, requested that the university produce documents regarding the acquisition. The university refused to produce the records on the grounds that they constituted trade secrets and that the attorney was limited to civil discovery available as part of his lawsuit. Further litigation resulted in the production of some of the records. The Supreme Court of Ohio held that public entities, as well as private entities, may possess trade secrets, and that the court must examine the records to determine if they are in fact trade secrets.[13] The court applied the same holding to records characterized as intellectual property.

In New York a community college student challenged the city's adoption of a budget provision conditioning city funding of the community college system on the passing of exams by remedial students. The student further claims that the city, by law, had to pay the college system $79.4 million per year unconditionally. The city argued that the student had standing to sue, since she would not be required to take the exams. A trial court held that despite that fact, the student did have standing, since withdrawal of funding would harm her in the form of increased tuition.[14] The court further held that the grant of power over university governance to the community college board is exclusive, so the city could not mandate examination requirements. Lastly, the court agreed with the petitioner that the city, under state statute, had to pay $79.4 million to the college system.

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[11] Medical Soc'y of S.C. v. Medical Univ. of S.C., 513 S.E. 2d 352 [133 Educ. L. Rep. 1071] (S.C. 1999).

[12] University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf, 516 S.E.2d 741 [136 Educ. L. Rep. 591] (W. Va. 1998).

[13] State ex rel. Besser v. Ohio State Univ., 721 N.E.2d 1044 [140 Educ. L. Rep. 732] (Ohio 1999).

A union contested the refusal to issue salary increases by a university which was required under a collective bargaining agreement. A trial court granted the university summary judgment, finding that state law required the legislature to appropriate funds for the pay increases to the university (which they did not) in order for the university to be obligated to pay the increases The Supreme Court of Alaska affirmed.[15] The union argued that the university should be obligated to pay the increases out of appropriated unrestricted funds. The court reasoned that the university, under the collective bargaining agreement, had no obligation to pay the increases until it had received funding from the legislature. The court further asserted that a state agency cannot circumvent the failure of the legislature to appropriate funds by reallocating its existing resources.

Agency Authority

A religious school challenged the Department of Education's (DOE) decision not to reimburse it under the Pell Grant Program as being arbitrary and capricious. The DOE based its decision on its determination that the program for which the funds were designated was not vocational. In order to be eligible for Pell Grant funding, a program must be vocational, in that it prepares a student for gainful employment in a recognized occupation. The court granted summary judgment to the DOE on the basis that its decision was not arbitrary or capricious.[16] The court offered that the program, which the school claimed would prepare students to be teachers, had no courses in teaching methodology and used elementary textbooks, and that most of the students had no intention of becoming teachers or were elderly and infirm. The court further noted that the school failed to provide the DOE with materials necessary to authorize reimbursement.

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[14] Perez v. Giuliani, 697 N.Y.S.2d 470 [139 Educ. L. Rep. 582] (N.Y. Sup. Ct. 1999).

[15] University of Alaska Classified Employees Ass'n v. University of Alaska, 988 P.2d 105 [139 Educ. L. Rep. 684] (Alaska 1999).

[16] Beth Jacob Hebrew Teachers College v. Riley, 73 F. Supp.2d 262 [140 Educ. L. Rep. 579] (E.D. N.Y. 1999).

Individuals challenged a city's approval of the development of a hotel on a university campus. A land use board of appeals found that since the city's approval was not clearly wrong, the decision was irreversible. An appellate court affirmed, reasoning that the review of land use standards follows the "clearly wrong" standard.[17] Therefore, as long as the city's approval was not clearly wrong under the land use statutes, the court agreed that its decision was final.

In Indiana, a law student who was arrested for driving under the influence of alcohol challenged the validity of a campus police force created by a private religious university. An appellate court ruled that since the university was an accredited institution of higher learning it did meet all state statutory requirements allowing the university to create their own police force.[18] The court also declared that the police officers did not have to abide by the same training practices as other police, an argument which was part of the defendant's attempt to nullify the validity of the campus police force.

License

A university urged a city to address the presence of unlawful activity at a nearby arcade and laundry. In response, and with the assistance of the university, the city decided to issue a cease operations order, and the laundry and arcade filed a civil rights action against the city and university. The university claimed immunity under the *Noerr-Pennington* doctrine, which protects entities which petition the government. After a trial court dismissed the claim, the university appealed. The Trial Court was of the opinion that the dismissal of the immunity claim was not immediately appealable.[19] The court reasoned that unlike a governmental immunity claim which is immediately appealable, the *Noerr-Pennington* doctrine does not provide immunity from suit, but rather a defense against liability. The court justified this assertion by arguing that freedom from suit is not necessary to prevent a chilling effect on petitions to the government.

Accreditation

A private design program accreditation organization denied accreditation to a design college due to failure to meet its standards. A federal trial court in Michigan granted the accrediting organization's motions for summary judgment in finding that the decision was fair and supported by substantial evidence, and that the organization did not act in an arbitrary or capricious manner. The program then brought counterclaims against the organization alleging breach of contract and fiduciary duty, fraud, antitrust violations, and violation of common law due process. The trial court dismissed the breach, due process, and fraud claims, holding that denials of accreditation should be analyzed as administrative law decisions and, as such, its prior decision in favor of the organization precluded these claims.[20] The trial court also dismissed the antitrust claim on the ground that the program failed to allege an anticompetitive effect on the basis of being denied accreditation.

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[17] Schwerdt v. City of Corvallis, 987 P.2d 1243 [139 Educ. L. Rep. 673] (Or. Ct. App. 1999).

[18] Myers v. State 714 N.E.2d 276 [136 Educ. L. Rep. 1038] (Ind. Ct. App.1999).

[19] We, Inc. v. City of Philadelphia, 174 F.3d 322 [134 Educ. L. Rep. 757] (3d Cir. 1999).

Sunshine Laws

In California, a journalist alleged that the Board of Regents violated the Open Meeting Act when they conducted a secret meeting to vote for the prohibition of race consideration in university admission policies. The Supreme Court of California reversed a lower court decision and held that the journalist could not bring suit under the Act because it provided a right of action to stop or prevent only present or future violations, not past violations.[21] The court additionally held that the thirty-day statute of limitations could not be extended even if the Regents fraudulently concealed the cause of action against itself.

In response to the publication of presidential candidates by the student newspaper, a public university conducted a private search for a new president. The university was then charged with violating the state Open Meetings Act (OMA). An appellate court denied summary judgment to the university. Thereafter, the Supreme Court of Michigan in finding that the university violated the OMA.[22] The court reasoned that the state constitution established the university as an independent branch of government, and gives the board the power to elect presidents. This limits the legislature's power to control the university. The court asserted that application of the OMA to the university's selection process violated the university's constitutional power to supervise itself. Further, the court was of the view that the constitution only requires that formal sessions of governing boards be open to the public.

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[20] Foundation for Interior Design Educ. Research v. Savannah College of Art and Design, 73 F. Supp.2d 829 [140 Educ. L. Rep. 588] (W.D. Mich. 1999).
[21] Regents of the Univ. of Cal. v. Superior Ct. of the City and County of San Francisco, 976 P.2d 808 [138 Educ. L. Rep. 1178] (Cal. 1999).
[22] Federated Publications, Inc. v. Board of Trustees of Mich. State Univ., 594 N.W.2d 491 [135 Educ. L. Rep. 242] (Mich. 1999).

Freedom of Information

In an action under the Freedom of Information Law, an appellate court in New York held that a city university must disclose employees' public employment history and dates of attendance at academic institutions.[23] The court reasoned that disclosure of public employment history records is not an unwarranted invasion of employees' privacy because public employment is a matter of public record. The court asserted that dates of attendance should be disclosed where, as here, employee did not initially meet licensing requirements when hired and so must have worked a number of years in the field in order to have qualified for the job.

Taxation

In an increasingly contentious area of tax law, only one case emerged in this year pitting city officials and university-based organizations against each other over the issue of property tax exemption. The case involved a private non-profit organization which was created by a national fraternity for the sole purpose of owning real estate to be used for fraternal purposes near the campus of Georgia Institute of Technology.[24] The organization, Zach, Inc. filed suit against the Fulton County government seeking property tax exemption for a building erected for and used as a college. Zach, Inc., relied on the exemption from *ad valorem* property taxes which allows for tax exempt status as long as the facility is used for educational purposes. The Supreme Court of Georgia, upheld a lower court's decision that because the company existed solely to own and operate property making no mention of education in their articles of incorporation, that they were not entitled to the *ad valorem* property tax exemption set forth by the county and state.

In a different type of tax dispute, two state universities in Oregon were sued by the Internal Revenue Service after they conducted collaborative affinity credit card programs. The alumni associations raised money for their schools by letting a bank offer credit cards using their names. Oregon State University grossed over $600,000 in two years while the University of Oregon grossed over $500,000 in two years by participating in the affinity credit card program. The Internal Revenue Service sued for back taxes claiming that the money was unrelated business income. The Tax Court, affirmed by the Ninth Circuit,[25] rejected the IRS commissioner's complaint, holding that the money from the affinity credit card program was royalty income. The court pointed out that the amount of work done by the universities in the affinity credit card program was insufficient to jeopardize the royalty status of the money received from the affinity card program.

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[23] Kwasnik v. City of New York, 691 N.Y.S.2d 525 [136 Educ. L. Rep. 525] (N.Y. App. Div. 1999).

[24] Zach, Inc. v. Fulton County et al., 520 S.E.2d, 899 [139 Educ. L. Rep. 703] (Ga. 1999).

Jurisdiction

In an interstate dispute over reimbursement of college expenses, a physician filed a breach of contract action in California against a university health center in Texas after he alleged that the health center refused to provide funding for his children's college costs. A series of budget cuts forced the physician to resigned from the Texas health center three years later and move back to California. However, the plaintiff insisted that the Texas health center fulfill its contractual obligations and pay for his children's collegiate expenses. An appellate court in California held that the contract established between the institution and the physician was valid. The court also determined that the plaintiff had established residency in Texas and was entitled to the benefits that accrue to in-state citizens. The court concluded that jurisdiction in California would create a burden on the health center in its efforts to defend itself against the plaintiff's claims in the future.[26]

A student loan lender sought to recover funds disbursed to a business school which ceased operations. The state denied the request and a court of claims dismissed the claim. On further review, an appellate court in New York affirmed the dismissal on the ground of lack of subject matter jurisdiction.[27] The court reasoned that the court does not have jurisdiction to decide a case when "monetary relief is incidental to the primary claim," which was the case in this instance since the lender was seeking reimbursement. In such cases, an action must be brought to the state trial court. The court added, that had it had jurisdiction, it would have dismissed the claim because there was no right of action under state statute for the lender to seek reimbursement.

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[25] Oregon State Univ. Alumni Ass'n v. Commissioner of Internal Revenue Serv., 193 F.3d 1098 [139 Educ. L. Rep. 90] (9th Cir. 1999).

[26] Stone v. State of Texas, 90 Cal. Rptr. 2d 657 (Cal. App. 4 Dist. 1999).

[27] Harvard Fin. Servs., Inc. v. State of New York, 698 N.Y.S.2d 84 [139 Educ. L. Rep. 1009] (N.Y. App. Div. 1999).

Standing

Yale University was sued after it planned to demolish a divinity school quadrangle which had been previously constructed with trust funds donated by a graduate. An heir of the creator of the trust, alumni donors and students sought to stop the demolition. An appellate court in Connecticut affirmed the dismissal of the claim, ruling that the heir did not have standing to sue because the creator of the trust did not create a right to control the property in the trust. The court maintained that, neither he nor his heirs had standing to challenge the execution of the trust.[28] For the same reasons, and due to the unrestricted nature of their gifts, the court held that the alumni donors also lacked standing. As for the students, the court found that they, too, lacked standing because they failed to allege an injury to a specific personal or legal interest.

Mootness

A college football player received a temporary injunction enjoining the NCAA from enforcing rules that would have removed his eligibility to play football in the 1996 season. After an appellate court refused to expedite the NCAA's appeal, the football player played the entire season. Since there was no remaining controversy, the appeals court dismissed the appeal as moot. On further review, the Supreme Court of Texas reversed, holding that the appeal was not moot.[29] The court first noted that the one of the rules the NCAA sought to enforce was designed to be applied retroactively for eligibility violations. The court then held that because the nature of the action the NCAA desired to implement was retroactive, the passage of the football season was irrelevant and so there still existed a tangible controversy that needed to be addressed by the trial court. The court also asserted that the football player continued to have an interest in the case because the NCAA's retroactive penalties could have an adverse impact on his future.

Discovery

In a personal injury action, a woman requested the production of documents by the Quality Management Department (QMD) of the hospital where she was treated. A trial court ordered production of both a report which assessed the care provided to the woman and the file maintained by the QMD in relation to the suit. An appellate court in New York reversed in acknowledging that the report was privileged since it related to a quality assurance review function.[30] The appellate panel added that the QMD file had to be inspected by the trial court to determine if it was privileged, since documents placed in a quality assurance file are not per se privileged.

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[28] Russell v. Yale Univ., 737 A.2d 941 [138 Educ. L. Rep. 441] (Conn. App. Ct. 1999).

[29] National Collegiate Athletic Ass'n v. Jones, 1 S.W.3d 83 [140 Educ. L. Rep. 398] (Tex. 1999).

Federal Issues

This section reviews cases dealing with Eleventh Amendment Immunity as well as the application of various federal statutes and other constitutional claims.

Eleventh Amendment Immunity

As mentioned earlier, one of the most important changes in constitutional law in decades was a series of recent Supreme Court rulings that challenged the traditional legal standards of federalism. In reversing the precedents established during previous decades that imposed greater liability on states for noncompliance and vested greater authority in the United States Congress to enact national laws, the Supreme Court has begun reinterpreting and expanding the constitutional provision of Eleventh Amendment state sovereignty.

The Eleventh Amendment prohibits a private party from recovery of funds from a state treasury for a liability judgment against the state. As such, universities most often invoke the Eleventh Amendment defense when private parties attempt to bring suit against them. However, private parties increased litigation involving State agencies, particularly universities and agents of universities, have required federal courts to consider the circumstances in which universities are entitled to immunity as permitted by the Eleventh Amendment. While the Eleventh Amendment provides general immunity to the State and its agencies,[31] it does not permit States to discriminate against private persons in violation of federal statutes that enforce the Fourteenth Amendment.

The new federal balance directly affects several laws that impact state education policy. This is apparent in the recent set Supreme Court rulings that have substantially redefined the boundaries of the Eleventh Amendment to the benefit of public colleges and universities. Currently, state education policy analysts and administrators at all public education levels are trying to acquire a sufficient understanding of what these new rulings encompass. The recent string of rulings initially began in 1997 when the Supreme Court struck down a Congressional attempt to hold states liable under the Religious Freedom Restoration Act in *City of Boerne v. Flores.*[32] In *Boerne,* the court virtually eliminated any limitations on state sovereign immunity making public colleges and universities immune from most liability.

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[30] Spradley v. Pergament Home Centers, 689 N.Y.S.2d 516 [135 Educ. L. Rep. 233] (N.Y. App. Div. 1999).

[31] U.S.C.A. Const. Amend. 11.

During the last two years, the Supreme Court has decided several cases that have advanced the new judicial precedent regarding state authority advanced in the City of Boerne v. Flores holding. In *Alden v. Maine*[33] the Supreme Court held that the States' sovereign immunity from suit is a fundamental aspect of the sovereignty which States enjoy before the ratification of the Constitution. According to the Court, the Eleventh Amendment reinforces the sovereign power of the states by substantially limiting the power of the federal judiciary to hold states liable. It is also a statement by the Court that the sovereign immunity of states predates the admission of the states to the union, making such immunity a sovereign right of the state to be free from federal intervention.

In applying the new view of federalism to the Age Discrimination in Employment Act (ADEA)[34] in *Kimel v. Florida Board of Regents,*[35] the Supreme Court determined whether congress abrogated States' Eleventh Amendment immunity in its ADEA amendments and if so, whether Congress possessed the requisite constitutional authority to abrogate States' immunity. In addressing the first issue, the Court maintained that when Congress amended the ADEA, it explicitly included States and its agencies in its definition of employers subject to suits by individuals. Thus, in the event that a university, as a State agency discriminates against an employee, it cannot claim an Eleventh Amendment defense. The Court stated that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity, in its 1974 amendments to the ADEA.

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[32] 521 U.S. 507 (1997). See also Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

[33] Alden v. Maine, 527 U.S., — 144 L Ed 2d 636, 119 S.Ct. 2240 (1999).

[34] 29 U.S. C. § 621 et seq. (1994 ed. and Supp. III). THE ADEA makes it unlawful for an employer including a Sate or an arm of the State – to discriminate by failing or refusing to hire or discharge, or engaging in any other form of employment discrimination (i.e. compensation, terms, conditions, or privileges of employment), against an individual because of his/her age. The ADEA also permits an individual to bring a civil action against any employer who violates the ADEA. 29 U.S. C. § 216 (b).

In finding that Congress did expressly abrogate states' Eleventh Amendment immunity in amending the ADEA, the Court next determined whether such legislation was a valid exercise of Congress' constitutional authority. Reviewing its earlier decision in *Seminole Tribe of Florida v. Florida*, the Court maintained that Congress lacked the requisite authority to abrogate states Eleventh Amendment immunity under Article I of the Commerce Clause. However, Section 5 of the Fourteenth Amendment grants Congress discretion to enact legislation that will enforce the provisions of the Amendment. The Court reasoned that in order for the legislation to be permissible under Section 5, it must be determined whether the enactment constituted a redefinition of the Fourteenth Amendment. The court declared that since age has not been subjected to historical and widespread discrimination, it is not a protected class under the Equal Protection Clause. Moreover, the elderly are not considered a discrete and insular minority as old age does not affect a select portion of the population. Consequently, so long as states have a legitimate state interest, states may discriminate on the basis of age without violating the Fourteenth Amendment. The 1974 amendments to the ADEA effectively redefines the classes protected under the Equal Protection of the Fourteenth Amendment. Age discrimination has not become so pervasive among public agencies that it warrants Fourteenth Amendment protection.

Kimel overturned several circuits' court of appeals' decisions in which parties alleged discrimination in violation of the ADEA.[36] The court of these circuits concluded that the ADEA's inclusion of states as employers did, in effect, abrogate the States' Eleventh Amendment immunity.

In a more recent ruling that advances the Supreme Court's consistent stance on federalism and state authority, a bank in New Jersey sued the University of Florida's Board of Regents alleging a patent violation. The case emerged after the Florida Prepaid Postsecondary Education Expenses Board (Florida Prepaid), a state entity, established a program by which state residents could prepay for college tuition to be used at a later date. College Savings Bank brought an infringement suit alleging that Florida Prepaid's program violated the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), which expressly stated that States, and any entity of the State, could not invoke its Eleventh Amendment immunity if it engaged in patent infringement.[37]

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[35] 1528 U.S. 62 [140 Educ. L.Rep. 825] (2000).

[36] See, e.g., Tennessee. Bd. of Regents v. Coger, 120 S. Ct. 928 (2000); Illinois. State Univ. v. Varner, 120 S. Ct. 928 [140 Educ. L. Rep. 854] (2000); Board. of Regents of Univ. of New Mexico v. Migneault, 120 S. Ct. 928 (2000); Board. of Trustees of Univ. of Conn. v. Davis; 120 S. Ct. 928 (2000), State Univ. of NY v. Anderson, 120 S. Ct. 929 [140 Educ. L. Rep. 855] (2000); Board. of Trustees of So. Ill. Univ. v. Wichmann, 120 S. Ct. 929 (2000); Kimel v. Florida. Bd. of Regents, 120 S. Ct. 631 [140 Educ. L. Rep. 825] (2000).

[37] 35 U.S.C. § 296(a).

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[38] the Supreme Court, without much inquiry, acknowledged Congress' statutory language in abrogating States' immunity as unmistakably clear.[39] However, the Court had to decide whether such uses of Congressional powers were permissible, and under what constitutional authority did Congress proceed. The Court concluded that Congress impermissibly asserted its powers in enacting § 296(a) of the Patent Remedy since Section 5 of the Fourteenth Amendment grants Congress the power to enact remedial legislation, which enforces the section Fourteenth Amendment. However, the Court found that Congress exceeded this authority in enacting the Patent Remedy Act by redefining the protections that the Fourteenth Amendment guarantees. The Court reasoned that Congress presented no evidence that a history of state patent infringement existed or suggested that state patent infringement had become so pervasive as to require constitutional protection against deprivation of constitutional property rights.[40] The Court further reasoned that the due process provision of the Fourteenth Amendment does not make it unlawful for the state to deprive an individual of a constitutionally protected interest; such deprivation is unconstitutional when the state deprives an individual of a protected interest with due process of law. The Court posited that Section 5 of the Fourteenth Amendment extends to Congress the authority to enact enforcement legislation; however, in this instance, Congress exceeded this authority in abrogating States' immunity for both intentional and unintentional patent infringement under the Patent Remedy Act.

In addition to the patent infringement action, College Savings Bank alleged that Florida Prepaid misrepresented its prepay tuition program in violation of the Trademark Remedy Clarification Act (TCRA).[41] The Court held that Congress, in enacting the Lanham Act, again impermissibly abrogated the States' immunity, in the absence of evidence suggesting that Florida

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[38] 527 U.S. 627 (1999) [135 Educ. L. Rep 342] (1999).

[39] The specific language of the statute provides, in pertinent part, that "Any State, or instrumentality of a State and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity from suit in Federal court by any person for infringement of a patent under section 271." Id. at 2223 [at 346].

[40] In enacting the Patent Remedy Act, Congress justified abrogating States' immunity by arguing that patents are property as defined by the courts, and the Fourteenth Amendment prohibits States from depriving citizens of property without due process of law. Id, 119 S. Ct 2199 at 2206.

[41] TCRA subjects states to suit brought under § 43(a) of the Trademark Act of 1946 (Lanham Act). The Lanham Act prohibits persons from falsely advertising its products in commerce. 15 U.S.C. § 1125(a).

Prepaid voluntarily or constructively waived its immunity. The Court rejected College Savings Bank and the United States' assertion that Florida Prepaid evoked the waiver of immunity, as set forth in the Lanham Act by allegedly misrepresenting its prepay program. In dismissing the bank and the United States' argument, the Court reasoned that in order to effect a valid waiver of immunity, the State must unequivocally express its intent to waive its immunity. The Court believed State's engagement in certain activity does not explicitly indicate intent to waive its immunity. The Court concluded that the State's participation in certain activity may not involuntarily result in a deprivation of constitutionally protected rights. Since in instances of sovereign immunity, a waiver must be voluntarily entered into by the state and unequivocally expressed.[42]

Despite the consistency of recent Supreme Court rulings regarding the Eleventh Amendment, sovereign immunity continues to be a highly contested matter for federal courts to resolve. When a female student brought a Title IX discrimination claim after being permanently expelled from a Virginia university, the university invoked the Eleventh Amendment immunity defense. The student brought a sexual harassment claim against a former professor, which was dismissed. Subsequently, she was unable to find a faculty member to research her senior research project so she sent certain professors adverse e-mail messages, which resulted in two professors bringing sexual harassment charges against her. The university found the student guilty of sexual harassment and permanently expelled her. On further review, the Fourth Circuit maintained that a state's Eleventh Amendment immunity can be exempted in certain circumstances. In other words, a state may willingly give consent to waive its Eleventh Amendment immunity, or it may waive its immunity by participating in government-funded programs if Congress explicitly indicates that such participation constitutes an effective waiver of immunity. A federal trial court held that pursuant to its spending powers, Congress may condition receipt of federal funds upon States' compliance with conditions set forth in the program for which the State is receiving federal funds. Thus, in accepting Title IX funding, the court decided that the university agreed not to discriminate on the basis of sex and voluntarily consented to litigation in the event that an individual instituted a sex discrimination suit against the university.[43]

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[42] College Savings Bank v. Florida Prepaid Postsecondary Educ, Expense B., 527U. S. 666 [135 Educ. L. Rep. 362] (1999).

[43] Litman v. George Mason Univ., 186 F. 3d 544 [137 Educ. L. Rep. 790] (E.D. Va. 1999).

Waiver of Eleventh Amendment immunity may also be impacted by a state if it initiates the suit. A university in Minnesota brought a patent suit against a manufacturer in state court. When the manufacturer moved to take the suit to federal court, the university invoked its Eleventh Amendment defense. The district court held that the Eleventh Amendment does not prevent a suit from being removed from state court to federal court when a federal question is at issue, and the state is the plaintiff.[44]

However, Eleventh Amendment immunity continues to be one of the most recognized defenses asserted by states. When a former professor brought an ADEA retaliation claim against a university, the Eighth Circuit held that the Eleventh Amendment immunity may be asserted where an instrumentality of the state is named as the defendant. Concomitantly, the Eleventh Amendment immunity defense is permissible when it is invoked to protect the state from incurring substantial fees.[45] Although not explicitly overturned by the Supreme Court, the holding in this case is likely no longer good law in light of *Kimel v. Florida Board of Regents.*

In a case from Colorado, an Internet website owner and operator maintained and posted university athletic information for on his website the general public's use. When the Assistant Athletic Director allegedly denied him access to further information pertaining to the athletic department, the website owner sued the university and the assistant athletic director in his individual and official capacities. The federal trial court concluded that the university was an instrument of the state and could not be sued, pursuant to the Eleventh Amendment, unless the State consented to such.[46] Finding that the State did not waive its immunity, and the university did not expressly or "overwhelmingly implicitly" waive its sovereign immunity, the court held that the Eleventh Amendment barred the website owner's suit. Similarly, as an employee of the university, the director was protected by the Eleventh Amendment. In determining the Eleventh Amendment's applicability to the director, the court also considered the *Ex Parte Young* [47] exception to the Eleventh Amendment. The Court asserted that this exception holds a state official personally liable in the event that he/she violates a federal law. The Court held that the director was entitled to Eleventh Amendment protection because the website owner failed to identify an ongoing violation of federal law as is required for a state official to be liable under the

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[44] Regents of the Univ. of Minn. v. Glaxo Wellcome, Inc., 58 F. Supp. 2d 1036 [138 Educ. L. Rep. 718] (D. Minn. 1999).

[45] Becker v. University of Nebraska at Omaha, 191 F.3d 904 [138 Educ. L. Rep. 656] (8th Cir. Neb. 1999).

[46] Smith v. Plati, 56 F. Supp. 2d 1195 [137 Educ. L. Rep. 918] (D. Colo. 1999).

[47] 209 U.S. 123, (1908).

Ex Parte Young exception. Further, the Eleventh Amendment bars application of the *Ex Parte Young* exception when State agencies are involved; thus, as a university official, the exception did not apply to the director.

The *Ex Parte Young* exception was again considered in a suit against a university and the Commissioner and Assistant Commissioner of Massachusetts Public Health. When a university contracted with the State public health department to screen all of its newborn babies for diseases, a private medical screening corporation brought suit alleging violation of the Sherman Act. The corporation argued that the university had a monopoly on the newborn screening services in Massachusetts, and on appeal, named the Commissioner and Assistant Commissioner as defendants. The first circuit held that the Sherman Act does not apply to state action, thereby suggesting Congress' intent not to require state compliance with the Act. In fact, The Court explained that, states are permitted to engage in anti-competitive activities from which private individuals would be prohibited.[48]

A Reform Party gubernatorial candidate filed suit against a university in Virginia that housed the debate and its president. A radio talk show host invited the Democratic and Republican gubernatorial candidates to participate in a pre-election debate. The hosting radio station aired the debate and a local television station broadcast the debate. Three weeks before the debate and after arrangements for the debate were completed, the gubernatorial candidate for the Reform Party, the plaintiff, was chosen. Despite repeated attempts by the Reform Party candidate to be invited to participate, she was not included in the scheduled debate. Subsequently, the minority party candidate instituted a suit against several entities, including the university and its president. The university asserted the Eleventh Amendment defense. On appeal, the candidate alleged that Reform Party candidates would continue to be excluded from future debates. In its brief discussion of the Eleventh Amendment, the Fourth Circuit held that future exclusion from debates does not invoke the *Ex Parte Young* exception as it does not create an ongoing violation of federal law. The court insisted that "mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an on-going violation."[49] In affirming a ruling in favor of the defendants, the court of appeals held that the Eleventh Amendment barred suit against the university and its president.

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[48] Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24 [137 Educ. L. Rep. 498] (1st Cir. Mass. 1999).

[49] DeBauche v. Trani, 191 F.3d 499, 505 [138 Educ. L. Rep. 630] (4th Cir. Va. 1999).

These new Eleventh Amendment precedents have established a new legal playing field for public colleges and universities by granting them further immunity from damages claimed by aggrieved parties. Generally, these rulings are being perceived as good news for public universities. However, the extent to which these new legal parameters grant universities unlimited protection from liability remains an extremely ambiguous area that will undoubtedly required further Supreme Court attention in the near future.

Title IX

Title IX cases alleging sexual discrimination continue to be a source of litigation in higher education. In one, case a female student in North Carolina claimed sexual discrimination in violation of Title IX because the university refused to allow her to play on the football team. A Federal Trial Court ruled in favor of the institution's motion to dismiss because of a contact sport exception to the general prohibition of sex discrimination in intercollegiate athletics.[50]

In two separate cases where sexual harassment was asserted by female students against their professors, the courts held that the institutions were not liable for their inaction to address the alleged harassment because of lack of substantive evidence. In an appeal where a female University, the first of a lower court ruling one female student sued Brown University, the First Circuit affirmed a grant of summary judgment in favor of the university.[51] In another, case a graduate student who sued a professor and college for sexual harassment and assault and battery, the federal trial court in Rhode Island denied the professor's motion for summary judgment because there was enough evidence to support the alleged misconduct.[52] However, the court did grant summary judgment to the institution since there was not sufficient evidence that the administrative officials had actual knowledge of the harassment.

A group of former female athletes brought suit against a university and its officials asserting that their tennis coach sexually harassed them over an approximate three-year period.[53] A federal trial court in New York ruled that the former athletes' complaint was sufficient enough to state claim against the university under Title IX. The court found that university officials knew of the harassment and not did respond adequately. However, the court also declared that there was little evidence to support the claim that university official co-conspired to cover-up evidence of ongoing sexual harassment by the coach.

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[50] Mercer v. Duke Univ., 32 F. Supp.2d 836 [132 Educ. L. Rep. 351] (M.D.N.C. 1998).

[51] Wills v. Brown Univ., 184 F.3d 20 [137 Educ. L. Rep. 93] (1st Cir. 1999).

[52] Liu v. Striuli, 36 F. Supp.2d 452 [133 Educ. L .Rep. 431] (D.R.I. 1999).

[53] Ericson v. Syracuse Univ., 35 F. Supp.2d 326 [133 Educ. L. Rep. 70] (S.D.N.Y. 1999).

At Illinois State University a group of present, former, and prospective male students sued the university for eliminating the men's soccer and wrestling programs in an attempt to comply with federal Title IX regulations. The plaintiffs claimed the institution discriminated against them on the basis of gender while also asserting a Title VI denial of equal opportunities for minority students.[54] To complicate the situation, some of the students had been promised athletic scholarships for the duration of their collegiate careers. A federal trial court granted the university's motion for summary judgment since the judge was convinced that university officials did not violate Title IX by attempting to pursue the proportionality benchmark for compliance. Also, the court decided that since the consequential reduction of minority participation did not show disparate impact, the claim should be dismissed.

Whistleblower Protection Act

A former employee of university in Texas was notified of her termination from her position as Assistant Athletic Director after informing authorities of the university's non-compliance with National Collegiate Athletic Association (NCAA) regulations. After the employee was denied in her attempt to regain her position through the university's grievance and appeal procedures, she filed suit alleging violations of the federal Whistleblower Protection Act, which allows a public employee to file suit within 90 days of when a violation has occurred. An appellate court in Texas dismissed the case because the plaintiff failed to file her claim in a timely manner. The court reasoned that the time limitation for a "cause of action begins accruing when the employee learns of the alleged discriminatory employment, not when the consequences of the decision come to fruition".[55] Thus, in order to advance a valid complaint, the court wrote that the former employee should have filed the claim immediately upon learning of the university's decision to terminate her employment.

In a case involving the clarification of a university policy and state statute, a university employee filed a complaint with the Department of Labor after the institution refused to pay her for overtime. Believing that the university's action was in retaliation for an earlier complaint that she had advanced against the university, she sued the university for violating Arizona's Whistleblower Protection Act and the institution's own Whistleblower Protection policy. The Supreme Court of Arizona held that whenever a conflict between an administrative agency and a state statute exists, the statute required precedence.[56] The court reasoned that administrative agencies such as universities lack legislative authority inherent in state statutes. The court maintained that the university's use of "[u]nless otherwise prohibited by law," was distinct from the statute's "provision of law." The court as of the opinion that the statute's frequent use of "provision of law" to refer to federal and state constitutions, statutes, executive orders, or rules of an administrative agency, indicated the legislature's intent to use this phrase to include an agency rule. However, the court noted that when the statute used the phrase "provided by law" it was used to exclude agency rules. From this analysis, the court concluded that "unless otherwise provided by law," the statute did not include agency rules. Thus, the court concluded that since the university's policy was inconsistent and in direct conflict with the Arizona statute, it was an insufficient ground on which to pursue grievances against the institution.

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[54] Harper v. Board of Regents, Ill State Univ., 35 F. Supp.2d 1118 [133 Educ. L. Rep. 89] (C.D.Ill. 1999).

[55] University of Texas v. De Los Santos, 997 S.W.2d 817, 820 [137 Educ. L. Rep. 399] (Tex. App. 1999).

Patent/Royalties

Patent law is rapidly becoming a highly charged and expanded area of university litigation. In a case involving the patent rights and royalties emanating from a chemical compound developed by the University of Minnesota and used to treat immune deficiency syndrome (AIDS), the university filed suit against a pharmaceutical company, for refusing to pay royalties. The defendant claimed that the License Agreement required them to only pay 5% royalties if the compounds were approved and sold in the United States. The university claimed that the agreement was based on a 10% royalty payment and extended beyond American borders. The federal trial court held that even if the defendant manufactured the medical treatment with the chemical compound for distribution solely in the United Kingdom, the federal courts have jurisdiction and are allowed to determine whether the defendant's have infringed upon the university's federally protected patents.[57]

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[56] Arizona State Bd. of Regents v. Arizona State Personnel Board, 985 P.2d 1032 [138 Educ. L. Rep. 933) (Auz, 1999).

[57] Regents v. University of MN v. Glaxo Wellcome, Inc., 44. F. Supp.2d 998 [135 Educ. L. Rep. 85] (D.Minn 1999).

In another patent action, a university in California owned the patent to technology that proved useful with a skin laser treatment. The company which marketed the laser treatment entered into negotiations with the university to negotiate a licensing agreement. The parties disputed whether the negotiations culminated into an actual licensing agreement between the company and the university. The university later granted another company exclusive use of its technology which motivated the laser treatment company to institute a patent infringement action against the university. In considering whether the university could effectively assert its immunity defense, a federal trial court in California asserted that Congress may permissibly condition States' waiver of immunity upon them receipt of federal benefits, so long as Congress unequivocally expresses its intent to abrogate States' sovereign immunity. The court justified its position by acknowledging that patents are considered intellectual property that must be obtained from the federal Patent and Trademark Office. According to the court, a patent guarantees the owner exclusive use of the patent and the constitutional protections afforded to property interests. The court further reasoned that a patent is a "gift bestowed by the federal government." Thus, the court was satisfied Congress validly abrogated States' immunity by conditioning this waiver on the receipt of a "gift," namely a patent. Thus, the court rejected the university's Eleventh Amendment immunity defense.[58]

False Claims Act

When a dermatology student at a Texas medical school discovered that staff physicians were illegally misrepresenting themselves on patient medical reports, she reported the incidents to the university's general counsel. Months later, the student sued university officials for retaliatory treatment and for violating the False Claims Act after she was unable to complete her residency because of declining performance. The Fifth Circuit held that the plaintiff's action was barred by the Eleventh Amendment since she sought reprieve as an individual.[59]

In a second case from Texas, case a tenure-track faculty member alleged a violation of the False Claims Act retaliation provision after he was refused tenure from his department. He claimed that his faculty colleagues did not support his promotion efforts and committed grant fraud in failing to allow a grant project he was overseeing to sufficiently meet NIH standards for continuation. A federal trial court held that the False Claims Act only applied to employees who were able to demonstrate adverse action by their employer due to observances of unlawful and illegal activity.[60]

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[58] New Star Laser v. Regents of Univ., of Cal, 63 F. Supp. 2d 1240 [139 Educ. L. Rep. 239] (E.D. Cal. 1999).

[59] United States. v. Texas Tech Univ., 171 F.3d 279 [133 Educ. L. Rep. 691] (5th Cir. 1999).

After a medical student failed to disclose his private funding sources on his grant applications to the National Institute of Health (NIH), a colleague filed a False Claims Act qui tam action. An NIH investigation determined that no fraud or conflict of interest existed. Subsequently, the plaintiff's colleague informed the United States House of Representatives of the researcher's failure to disclose the proper information. In its report, the House identified the medical researcher as having engaged in fraudulent activity. This prompted another investigation by NIH who reversed their earlier decision and agreed with the House report. However, the Third Circuit held that since the government had been aware of the false claims and the fraudulent activity and refused to take any action against the researcher, then the plaintiff could not bring a qui tam action on the government's behalf. Additionally, in evaluating whether the medical researcher knowingly submitted false claims, the court observed an earlier appellate court correctly recognized that the medical researcher had sufficient knowledge that he was supposed to report all outside funding on the grant application.[61]

Contract Compliance Claims

A employee whose employment was terminated, sought review of the dismissal of his administrative complaint against the university by the Office of Federal Contract Compliance Programs (OFCCP). The bases for the complaint were various discrimination claims based on federal statutes. In dismissing the action, a federal trial court in California held that determinations of the OFCCP were final for the purposes of the Administrative Procedure Act (APA), and therefore immune from judicial review.[62] The court reasoned that statutes like this one that did not provide for judicial review of an agency's enforcement decisions are governed by the APA. Under the APA, the court declared that final agency action is unreviewable if it is committed to agency discretion by law, since there is no law to apply in review.

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[60] Miller v. Bunce, 60 F. Supp. 2d 620 (S. D. Texas 1999).

[61] United States ex rel. Cantekin v. University of Pittsburgh, 192 F.3d 402 [138 Educ. L. Rep. 670] (3rd Cir. 1999).

[62] Dees v. Cal. State Univ., Hayward, 33 F. Supp.2d 1190 [132 Educ. L. Rep. 735] (N.D. Cal. 1998).

Medicare Act

Teaching hospitals claimed that improper auditing standards were being used by the Office of the Inspector General in the investigation of Medicare overcharges. A federal trial court in California dismissed the case, holding that under the APA, it was unable to hear the case since there had no been final agency action.[63] The court stated that the APA allows suits against the United States only where complained of agency action is final. Here, the court pointed out that the agency actions were not final because they would have had no direct effect on the teaching hospitals until the government sought to take legal action against them.

A university hospital challenged the determination by the Secretary of the Department of Health and Human Services of the per resident amount under the Medicare program. This figure is used to determine the amount Medicare reimburses for graduate medical education. The hospital sought to have all of its teaching physician office space, and costs of clerical, laundry, and cafeteria services be treated as part of its graduate education program. The Secretary sought to apply revised office cost determinations retroactively. The Eighth Circuit held that such determinations could not be applied retroactively, because to do so would be unfair to the hospital which was following the law at the time and the Medicare statute did not permit such retroactive application.[64] The court also held that the Secretary could not limit the hospital's office space claim to the percentage of time spent pursuing graduate medical activities and that clerical, laundry, and cafeteria claims could only be raised to the extent that related to graduate medical education.

Service/Civil Procedure

A university and several professors challenged the service of complaints that they, along with the university's chancellor and president, received. The federal trial court in Puerto Rico held that since a university campus is not a usual "place of abode" of professors named as defendants, for the purposes of service of process under the Federal Rules of Civil Procedure, the professors could not have been served at the university.[65]

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[63] Association of Am. Med. Colleges v. U.S., 34 F. Supp.2d 1187 [132 Educ. L. Rep. 781] (C.D. Cal. 1998).

[64] Univ. of Iowa Hospitals and Clinics v. Shalala, 180 F.3rd 943 [136 Educ. L. Rep. 186] (8th Cir. 1999).

[65] Boateng v. Inter Am. Univ. of P.R., 188 F.R.D. 26 [137 Educ. L. Rep. 714] (D. P.R. 1999).

The court added that service upon the chancellor as agent of the professors was not proper because the named defendants had not selected the chancellor as their agent. The court concluded that the university president's office was a proper location to effect service of process.

Higher Education Act

The 1965 Higher Education Act (HEA) was amended in 1990 by the passing of the Student Loan Default Prevention Initiative Act in order to reduce the number of defaulted federal loans. As amended, the HEA bases a school's eligibility to participate in federal loan programs on the school's students' default rates. A decision to terminate eligibility can be appealed to the Secretary of Education in one of three ways: an erroneous data appeal, an improper loan servicing or collection appeal, or an exceptional mitigating circumstances appeal. A school association challenged the Secretary's administration of appeals and sought an injunction. A Ninth Circuit affirmed that injunctive relief is precluded by the HEA.[66] The court reasoned that the relief sought, while characterized as "declaratory" was in fact injunctive, and barred by the statute. The court further declared that since final agency action had yet to be taken, it lacked jurisdiction to hear the case. The court did note that the association could challenge the appeals procedure once final agency action had been taken.

Constitutional Law Decisions

Many constitutional claims challenge employment decisions and other institutional policies made by colleges and universities. This section addresses a variety of cases involving constitutional challenges to institutional authority.

Commerce Clause

Congress enacted the Violence Against Women Act (VAWA) in 1994 in response to the problem of domestic abuse and sexual assault on women. The act contains numerous provisions to achieve this goal. One particular provision, 43 U.S.C. section 13981, establishes a federal substantive right in "[a]ll persons within the United States . . . to be free from crimes of violence motivated by gender." To enforce this right, the act creates a private cause of action against any person who commits a violent crime motivated by gender.

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[66] American Ass'n of Cosmetology Sch. v. Riley, 170 F.3d 1250 [133 Educ. L. Rep. 356] (9th Cir. 1999).

Christy Brzonkala brought an action under this section of VAWA against two men, fellow students at the college she attended, whom she alleged raped her. The men moved to dismiss the action on the basis that Congress was without constitutional authority to enact §13981. The United States intervened to defend the constitutionality of the section under the Commerce Clause of the constitution and Section 5 of the Fourteenth Amendment. The federal government argued that the section was an appropriate exercise of Congressional power under the Commerce Clause to regulate interstate commerce on the ground that violence against women is a significant social problem with effects on the national economy. The government further defended the section under the 14th Amendment on the grounds that bias and discrimination against women in state criminal justice systems frequently thwart legal redress to victims of gender motivated crimes of violence.

A federal trial court in West Virginia found that Congress was without authority to enact the section of VAWA. The government and Brzonkala appealed and a divided panel of Fourth Circuit reversed. An *en banc* Fourth Circuit affirmed the trial court.[67] The government and Brzonkala appealed to the Supreme Court and the Court granted certiorari.[68] On further review, the Supreme Court, in a 5-4 decision affirmed the ruling of the Fourth Circuit and struck down the civil remedy provision of the Violence Against Women Act.[69]

The Supreme Court, in a majority decision by Chief Justice Rehnquist, rejected both of Congress' claims of authority for enacting Section 13981: the Commerce Clause and Section 5 of the Fourteenth Amendment. The Court reviewed the three categories of activity that Congress may regulate under its commerce power as articulated in United States v. Lopez,[70] which struck down the Gun-Free School Zones Act. First, Congress may regulate use of the channels of interstate commerce. Second, Congress has power to regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce even though the threat may come only from interstate activities. Lastly, Congressional authority includes the power to regulate those activities, which substantially affect interstate commerce. The court rejected the extensive commerce clause authority that gender motivated violence has serious impact on these victims and families.

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[67] Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820 [136 Educ. L. Rep. 15] (4th Cir. 1999).

[68] Cert. granted sub nom. United States v. Morrison, 120 S. Ct. 11 (U.S. 1999).

[69] 514 U.S. 549, 115 S. Ct. 1624 (1995).

[70] 514 U.S. 549 (1995).

The dissenting opinion, authored by Justice Souter, focused on the extensive Congressional finding, which showed the effects of violence against women or interstate commerce. According to Souter, this extensive documentation would have provided authority for congressional action because of the cumulative effects and national basis features of the substantial effects test up until *Lopez* in 1995. Souter maintained that the fact that the act did not pass muster before the Court was proof, to nominal adherence to the substantial effects. Although a new jurisprudence has not emerged with any distinctness, Souter argued that was clear that some Congressional conclusions about obviously substantial, cumulative effects on commerce were assigned lesser values than the once-stable doctrine would assign them. These devaluations, he concluded, are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Qualified Immunity

A contractor challenged the constitutionality of a community college's set-aside policies for awarding construction contracts which required that certain percentages of the contract go to minority and female subcontractors. The contractor's bid was rejected for failure to comply with the minority requirement. A federal trial court in Ohio rejected the school's motion for summary judgment. [71] The court held that since at the time of the bid denial, the law enunciating the necessary factors of an affirmative action policy was clearly established, and that the school was aware of the law, and ignored it, it was not entitled to summary judgment on the basis of qualified immunity.

A state university employee claimed that her supervisors' ethnically insensitive comments violated her right to equal protection. A federal trial court in Alabama granted the supervisors' motion for summary judgment on the basis of qualified immunity.[72] The court reasoned that the insensitive and rude remarks made by the supervisors did not rise to the level of a violation of her right to equal protection.

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[71] F. Buddie Contracting v. Cuyahoga Community College Dist., 31 F. Supp.2d 584 [132 Educ. L. Rep. 117] (N.D. Ohio 1998).

[72] White v. Board of Trustees of the Univ. of Ala., 31 F. Supp.2d 953 [132 Educ. L. Rep. 124] (N.D. Ala. 1999).

Equal Protection

The Board of Trustees of a state's higher education system sought to expand the academic program of an historically black university which would have the effect of making it a four-year institution. The Board also sought to use race based admissions standards for the new campus. Private citizens and the United States sought to prohibit the Board from making these changes on the grounds that it should not be done so until the obligation of desegregation at existing universities was completed, and that an admission would not comply with existing admissions standards. A federal trial court in Mississippi held that, while not educationally sound, the expansion would not impede segregation, and therefore allowed it to go forward.[73] The court reasoned that expansion of an historically black college would not operate to impede segregation, since it might attract other-race students. However, the court added that the proposed race based admissions standards of the new campus were contrary to the admissions policies of the state university system, and therefore enjoined the university from using them.

A professor who was denied a tenure track position because of the university's desire to hire a female brought a suit under Title VII of the Civil Rights Act of 1964 which prohibits sex discrimination in employment decisions. A federal trial court dismissed the case on the grounds that such a decision was allowed under a valid affirmative action plan. On further review, the Seventh Circuit reversed and allowed the case to go forward because the issue of whether sex discrimination in the absence of prior discrimination would violate Title VII remained unresolved.[74] The court reasoned that this was due to the fact that: a jury might find that sex was the sole reason for the decision, which would be allowable only if prior discrimination existed; the university denied prior discrimination, and that the university must justify its use of sex as a factor in employment.

White students who were denied admission to a university challenged its affirmative action policy as being racially discriminatory. In regard to a student who was at first denied admission on the basis of race, but later accepted as a transfer student, a federal trial court in Georgia held that the student had standing to sue for the past unconstitutional behavior.[75] In addressing the constitutionality claim, the court held that the interest the university had in a diverse environment did not justify discriminatory admissions practices. In so holding, the court considered contrary language in Supreme Court decisions as non-binding. The court also found that the policy, due to its mechanical nature, actually hindered diversity. The court concluded that while remedying the effects of past discrimination is a compelling interest, the university had not provided sufficient evidence to show that such past discrimination had caused a current negative effect.

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[73] Ayers v. Fordice, 40 F. Supp.2d 382 [132 Educ. L. Rep. 172] (N.D. Miss. 1999).

[74] Hill v. Ross, 183 F.3d 586 [136 Educ. L. Rep. 754] (7th Cir. 1999).

A contractor challenged the constitutionality of a community college's set-aside policies for awarding construction contracts which required that certain percentages of the contract go to minority and female subcontractors. The contractor's bid was rejected for failure to comply with the minority requirement. A federal trial court in Ohio granted the contractor summary judgment, maintaining that the community college's policy was unconstitutional because it failed to demonstrate a compelling need for it on the basis of past discrimination in the construction industry.[76] The court further posited that even if there was a compelling interest, the policy was not narrowly tailored enough to achieve its purpose.

Due Process

An alumnus of a state university challenged the constitutionality of its exclusionary order based on his allegedly stalking female students on campus. The university had a policy for "Trespass on Campus? Exclusion Orders" which provided for the issuance of a written trespass warning to non-students as a means to provide protection, safety, and security for the welfare of the college students, staff, and faculty. The policy included procedures to be followed upon issuance of a warning such as requiring violators to be informed of the reason for being excluded from campus and of details of the incident. The Ninth Circuit affirmed the dismissal of the Section 1983 action on the basis that there was no constitutional right to be on campus.[77] Even though the university had a public forum relationship with its students, the court held that the university had reasonable authority to expel non-students pursuant to its policy regarding the issuance of exclusion orders.

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[75] Wooden v. Board of Regents of Univ. Sys. of Ga., 32 F. Supp.2d 1370 [132 Educ. L. Rep. 367] (S.D. Ga. 1999).

[76] F. Buddie Contracting v. Cuyahoga Community College Dist., 31 F. Supp.2d 571 [132 Educ. L. Rep. 104] (N.D. Ohio 1998).

[77] Souders v. Lucero, 196 F.3d 1040 [139 Educ. L. Rep. 878] (9th Cir. 1999).

First Amendment Speech

First Amendment speech issues have been a hotly contested area on college campuses especially when they involve student newspapers. In a case involving First and Fourteenth Amendment claims and related state constitutional claims, students brought action against Kentucky State University in connection with alleged attempts by school officials to influence the content of a student newspaper and ban to distribute the school yearbook.[78] After the administration confiscated copies of the University subsidized school yearbook because of substantive content concerns, the student editor filed suit to force the institution to relinquish control of the publication. Insofar as the university subsidized the yearbook, the University expected the editors to maintain two standards of quality control including provisions for accuracy and factual reporting. The Sixth Circuit granted the university's motion for summary judgment as a reasonable request in light of the yearbook's failure to accomplish its intended purpose. Also, the court stated that the students failed to demonstrate requisite injury for standing to assert a First Amendment free speech claim based on the university's attempt to control the newspaper's content.

In another case involving alleged First Amendment violations, a group of tenured and nontenured faculty members and an administrative aide filed action against the Board of Trustees of Ball State University for retaliating against them for protected speech and expression of academic freedom.[79] The case emerged from a longstanding dispute involving a departmental chair and other administrative personnel. The Seventh Circuit affirmed that the plaintiffs did not have sufficient evidence to pursue injunctive relief.

A community college district enacted a policy that set time and location limitations and gave preferential treatment to speech of a noncommercial nature. Students at one of the colleges challenged the policy as unconstitutional. A federal trial court in California granted the students' application for an injunction against the district.[80] The court first noted the students had standing to sue because compliance with the policy would have prevented them from engaging in constitutionally protected activities. The court then applied the strict scrutiny test to the policy since it regulated the content of protected speech, and found that the policy was not narrowly tailored and did not serve a compelling state interest. The court reasoned that the district's purported interest of promoting an educational rather than commercial atmosphere and protecting employees and students from fraud did not meet the strict scrutiny standard.

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[78] Kincaid v. Gibson, 191 F.3d 719 [138 Educ. L. Rep. 642] (6th Cir. 1999).

[79] Webb v. Board of Trustees of Ball State Univ., et al., 167 F.3d 1146 [132 Educ. L. Rep. 643] (7th Cir. 1999).

[80] Burbridge v. Sampson, 74 F. Supp.2d 940 [140 Educ. L. Rep. 606] (C.D. Cal. 1999).

In a case from New York, an English instructor was terminated after he permitted his class to use explicit language in their discussions and writing assignments. University officials maintained that the instructor's method of teaching violated the university's sexual harassment policy. A federal trial court held that the university deprived the former instructor of his First Amendment rights to academic freedom. The court reasoned that the former instructor's speech was improperly restricted as the reasons offered were not due to legitimate pedagogical concerns.[81] The court believed that university officials should have been aware that the First Amendment right to academic freedom protected the instructor's speech. Additionally, the court indicated that the university's sexual harassment policy was too broad and vague and further restricted the instructor's right to free speech. The court concluded that the university's failure to provide a hearing also violated the instructor's basic fundamental rights, further aiding its decision to deny its request for qualified immunity.

In the year's most closely watched case by university administrators, the Supreme Court ruled unanimously in *Board of Regents of the University of Wisconsin System v Southworth*, that mandatory student fees for student interest groups can be charged by institutions as long as the fees are considered part of the educational mission of the campus and are not used for ideological or political purposes.[82] At the heart of this analysis was the long-simmering issue of whether public colleges and universities violate the free-speech rights of student by using funds from mandatory fees to support political organizations. Despite the apparent similarities encompassing both cases, the Seventh and Ninth Circuits held divergent opinions regarding whether public universities were in violation of the plaintiff's contention that their First Amendment right to free-speech was being violated.

In *Southworth*, students at a large public university brought action against the university regents, alleging that the student activity fee requirement violated their First Amendment rights to free speech. The university maintained the existing mandatory fee system was an important part of the educational mission of the institution and protected the diversity of student views through a democratic student process. The Seventh Circuit disagreed and ruled that the University could not force students through the use of mandatory student fees to finance campus groups or private organizations that engage in political and ideological activities, speech, or advocacy.[83] In ruling for the plaintiffs, the Court used the three part 'germaneness' standard established in *Lehnert v Ferris* to assess the constitutionality of the student fee system. The Court held that a portion of the student fees system violated the germaneness standard by compelling the students to endorse or to finance political and ideological views..

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[81] Vega v. University of N.Y. Bd. of Trustees, 67 F. Supp. 2d 324, 341 (S.D.N.Y. 1999).

[82] Board of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217 [142 Educ. L. Rep. 624] (2000).

In the second case, a group of students and former students instituted an action to enjoin the University of Oregon from allocating funds from mandatory student fees to a single student public interest research organization (OSPIRG). As in *Southworth*, the plaintiffs sought relief by asserting that the fee policies violated their First Amendment right to free speech. They also alleged that the policies were in violation of their rights under the Fourteenth Amendment. The threshold issues here were whether all or some of the defendants were immune from suit under the Eleventh Amendment and whether the allocation of student fees to OSPIRG was unconstitutional. The institution asserted the Oregon statutory law authorizes the imposition of the fees to finance programs "under the supervision or control" of the Oregon State Board of Higher Education that is deemed "to be advantageous to the cultural or physical development of students." The University advanced a similar argument as in *Southworth*, asserting that the practice of collecting and distributing student fees is 'germane' to the educational mission of the institution. In ruling for the University of Oregon, the Ninth Circuit held that the distribution of revenues to the student organization presented no present threat to students' First Amendment rights of free speech and free association, mainly because steps had been taken to keep the funds from being used directly for political activities.[84] The court also ruled that the activities of OSPIRG were germane to the mission of the institution and that the distribution of funds to the organization serves a legitimate governmental interest that does not violate the First Amendment.

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[83] Southworth v. Grebes, 151 F.3d 717[128 Educ. L. Rep. 624] (7th Cir. 1998).

[84] Rounds v. Oregon State Bd. of Higher Educ., 166 F. 3d 1032 [132 Educ. L. Rep. 72] (9th Cir. 1999).

First Amendment Religion

In a high profile case involving the allocation of public resources to a Maryland private religious college, the Supreme Court denied *certiorari* to consider the college's appeal of a Fourth Circuit's ruling that the institution was too "pervasively sectarian" to receive public funds.[85]

In a First Amendment case involving the suspension of a student and the Church of Christ for using a public university forum to aggressively proselytize other students, a federal trial court in New York held that a student had no right to seek a preliminary injunction against the campus decision to suspend her because the university's action was justified.[86] However, the court granted the church's motion for a preliminary injunction and as encouraged to submit an appropriate order for the Court's consideration regarding the university's decision.

Four community college students in New York filed suit against the college and professors alleging that a course on human sexuality violated the Establishment Clause of the First Amendment. The students claimed that the course involves excessive entanglement between government and religion by "subjecting impressionable students to a barrage of dogmatic pronouncements against the Judeo-Christian sexual ethic and in favor of Eastern spirituality."[87] A federal trial court granted the college's motion for summary judgment because it was determined that the course was not unconstitutional and had a secular purpose. The court also stated that the course didn't entangle religion with government, and therefore did not violate the Establishment Clause.

A professor at a religious seminary in Indiana and a group of seminary administrators were sued for tortuous interference with contractual relations and breach of implied covenant of good faith and fair dealing The defendants asserted that court resolution of this matter would excessively entangle the court in religious concerns of the institution in violation of the Establishment Clause. An appellate court agreed that judicial intervention into the matter would clearly and excessively entangle the court in religious affairs and so dismissed the case.[88]

In California, a university chaplain and director of a campus ministry program at a church-affiliated university sued it after the institution reduced her employment status to 50 percent time. The plaintiff filed suit alleging that the real reason for the reduction in pay was not financially motivated, as asserted by the university, but rather discriminatory and retaliatory and violated the Fair Employment and Housing Act . The complaint was framed in three causes of action including breach of implied employment contract, sexual discrimination, and violation of public policy. The university filed for summary judgment contending that the religious clauses of the First Amendment bar civil court review of an employment dispute between a religious organization and its ministerial employee. An appellate court concurred with the university's claim holding that it was entitled to summary judgment because this case was a religious matter prohibiting external review by civil courts.[89]

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[85] Columbia Union College v. Clark, 527 U.S. 1013 [mem.] (1999).

[86] Lark v. Lacy 43 F.Supp.2d 449 [134 Educ. L. Rep. 906] (S.D.N.Y. 1999).

[87] Gheta v. Nassau County Community College, 33 F. Supp.2d 179 [132 Educ. L. Rep. 395] (E.D.N.Y. 1999).

[88] McEnroy v. St. Meinrad Sch. of Theology, 713 N.E.2d 334 [136 Educ. L. Rep. 541] (Ind. Ct. App. 1999).

Fifth Amendment

Two men in Texas who were involved in a hazing incident were charged with the misdemeanor of failure to report a hazing incident challenged the statute as unconstitutional in that it violated their Fifth Amendment right against self-incrimination. An appellate court affirmed the dismissal of the charges.[90] The court reasoned that by complying with the statute, the men would have subjected themselves to criminal liability for their involvement in the incident. Therefore, the court concluded that prosecuting the men for failure to report the incident violated the constitutional right against self-incrimination.

Discrimination in Employment

Equal Pay Act

A former women's basketball coach sued her university and its athletic director alleging violations of the Equal Pay Act (EPA) and breach of contract. The coach claimed that she had reached a contractual agreement with the university that would pay her the same salary as the men's basketball coach. The athletic director disputed these claims and filed for summary judgment. After denying the coach's motion for preliminary injunction, a federal trial court entered summary judgment for the university denying the plaintiff's claim to recuse and to re-tax costs. The Ninth Circuit held that the pay differential between the men's and women's coach was based on criteria other than sex and, therefore, does not violate the EPA.[91] The court also ruled that the university did not violate Title IX by terminating the coach's employment. However, the appellate panel disagreed with the lower court ruling in denying the plaintiff's motion to re-tax costs.

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[89] Schmoll v. Chapman Univ., 83 Cal.Rptr.2d 426 [133 Educ. L. Rep. 206] (Cal.Ct. App. 4 Dist. 1999).
[90] State v. Boyd, 2 S.W.3d 752 [140 Educ. L. Rep. 421] (Tex. Ct. App. 1999).

Age Discrimination in Employment Act

In Louisiana, a group of current and former faculty members brought an age discrimination action against a university after they alleged that they were being paid considerably less than younger, newly hired faculty members. An appellate panel in Louisiana affirmed that the disparate impact theory did not apply to Age Discrimination in Employment Act (ADEA) claims. The court stated that if Congress intended the disparate impact theory to apply to ADEA, it would have specifically created such a provision applying it to the language of Title VII. The court acknowledged that despite the Supreme Court's inclination to interpret the language of the ADEA according to the provisions of Title VII, the statutes are not the same. The court concluded that this refusal acknowledges Congress' belief that age and race discrimination claims substantially differ and should be afforded different statutory considerations.[92]

Title VII

Generally

An employee at a college in Alabama filed an action against it, claiming retaliation in violation of Title VII and the First Amendment. The employee found some sexually suggestive photographs of a student who had applied for a job with her office which had been taken by her supervisor. After she reported the photographs to the college president, her supervisor began to treat her poorly. During the investigation of the photographs, other employees stated that the employee had shown them the pictures, contradicting the employee's statements. Days later, the employee was dismissed due to making the photographs public. The employee then filed a charge with the EEOC Los Angeles Court of Appeals, and the college sought to cut off her unemployment benefits. The employee subsequently filed suit and the college unsuccessfully moved for summary judgment.[93] The court first asserted that the taking of the photographs was a violation of Title VII and that the employee could have reasonably believed that they constituted sexual harassment.

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[91] Stanley v. University of S. Cal., 178 F.3d 1069 [135 Educ. L. Rep. 1069] (9th Cir. 1999).

[92] O'Boyle v. Louisiana Tech Univ., 741 So.2d 1289 (1999).

In a case from Illinois, a professor filed a Title VII claim against her employer on the basis of sexual harassment by her department head. A federal trial court dismissed the claim on the basis that it was filed after the statute of limitations expired. The Seventh Circuit affirmed.[94] The court reasoned that the professor filed her complaint fifteen months after the department head resigned (the last possible date of harassment), which exceeded the 300 day limit within which she could have filed the complaint. The court further asserted that the professor was not entitled to an exception to the statute on the basis of the university having prevented her from filing in a timely manner.

A university professor alleged reverse racial discrimination on the part of the university in failing to hire her as department chair. The federal trial court in Vermont issued a pretrial ruling that the professor would not be entitled to the position even if discrimination was found, that the use of race in a hiring decision was justified under Title VII, and that the university's minority faculty incentive violated equal protection insofar as it served as an inducement to hire, but not to recruit.[95] The court reasoned that should the professor prevail at trial, it would not order her to be instated as chair since that would infringe upon the hiring decisions of the university. The court added that consideration of race was acceptable under Title VII given the under-representation of minorities in the faculty.

In Kansas, an applicant who was denied a teaching position at a state university brought an action under Title VII alleging discrimination on the basis of national origin. The federal trial court denied summary judgment for the university's motion, since there where genuine issues of material fact regarding its reasons for not hiring the applicant as being racially motivated.[96] The university claimed that the reason why the applicant was not hired was because it had a policy of not hiring recent graduates such as applicant. The court reasoned that there were inconsistencies in the university's explanation for not hiring the applicant, potentially unequal treatment as compared to other applicants, and potentially racist comments directed at the applicant. The court held that these factors raised a question of the university's reason not to hire as being a pretext for discrimination.

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[93] Bevill v. UAB Walker College, 62 F. Supp.2d 1259 [138 Educ. L. Rep. 1030] (N.D. Ala. 1999).

[94] Hentosh v. Herman M. Finch Univ. of Health Sciences, 167 F.3d 1170 [132 Educ. L. Rep. 649] (7th Cir. 1999).

[95] Honadle v. University of Vt. and State Agric. College, 56 F. Supp.2d 419 [137 Educ. L. Rep. 657] (D. Vt. 1999).

A white male applicant to a tenure track teaching position at a state university claimed reverse discrimination in violation of Title VII and Section 1983. A trial court granted the university's motion for summary judgment.[97] The court observed that the applicant failed to show a tendency on the part of the university to discriminate against white males which is necessary to make a case for reverse discrimination under Title VII. The court also decreed that there was no evidence of discrimination in regard to the applicant. Insofar as there was no discrimination, the court concluded that university officials were necessarily entitled to qualified immunity from the Section 1983 claims.

National Origin

Several professors alleged discrimination by their university on the basis of national origin in violation of Title VII and Section1983. A trial court in Virginia granted the university's motion for summary judgment, finding that promotion and salary increase decisions regarding the professors were not discriminatory.[98] The court held that non-discriminatory reasons existed for the promotion and salary decisions for each of the professors and that they had not raised any genuine issues of material fact as to discriminatory action. Further, the court ascertained that since the Eleventh Amendment barred suits against state actors in federal court, the university was immune from the section 1983 action.

A foreign born professor filed a claim with the state civil rights commission, alleging that he was discriminated against on the basis of national origin when he was terminated by a university. The commission ordered the professor reinstated. After a trial court denied the university's appeal of the order, and an appellate panel affirmed.[99] The panel began by noting that the trial court conducted a thorough examination of the record in reaching its decision. The court then reasoned that the professor was similarly situated with other professors in his department, yet was not treated similarly regarding reappointment procedures. Specifically, the court pointed out that the department did not apply the same standards of reappointment to the professor as it did to his colleagues. The court concluded that the reason for this dissimilar treatment was the professor's national origin, as evidenced by a memorandum regarding his dismissal notice which was written by the department chair and contained several references to his national origin.

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[96] Mohankumar v. Dunn, 59 F. Supp.2d 1123 [138 Educ. L. Rep. 314] (D. Kan. 1999).

[97] McHenry v. Pennsylvania State Sys. of Higher Educ., 50 F. Supp.2d 401 [136 Educ. L. Rep. 360] (E.D. Pa. 1999).

[98] Demuren v. Old Dominion Univ., 33 F. Supp.2d 469 [132 Educ. L. Rep. 437] (E.D. Va. 1999).

In Louisiana, an associate professor alleged that a university gave him comparably lower pay raises on the basis of his religion and national origin, denied his promotion to full professor, and denied him a pay raise in retaliation for the filing of the claim, thereby violating Title VII. A federal trial court granted the university's motion for summary judgment on the discrimination claim but allowed the case to go forward on the retaliation charge.[100] The court noted that although the professor established a prima facie case for discrimination, the university presented a legitimate non-discriminatory reason for the salary and promotion decisions. Since the professor did not possess the requisite teaching skills and had poor student and university relations. The court further asserted that comments regarding the professor's religion and national origin were not discriminatory since they were not made in proximity to the salary decisions and that they were not related to these decisions. The court, however, denied the motion for summary judgment on the retaliation claim because testimony in the Dean's deposition conveyed a retaliatory impetus behind the pay raise decision.

A minority female university employee who was dismissed alleged discrimination under Title VII. The basis of the claim was a warning by her supervisor not to speak in a foreign language in the office. The employee also alleged discrimination in the internal appeal process in retaliation for her filing of a grievance. A federal trial court in New York granted the university's motion for summary judgment on all other issues with the exception of the retaliation claim.[101] The court reasoned that while a speak-English instruction may be an inference for discrimination, the facts of the case rendered this warning insufficient to demonstrate discrimination. In support of this finding, the court pointed to the university's production of significant nondiscriminatory reasons for the dismissal: insubordination, unprofessional conduct, violation of policies, undermining supervisor's authority, and use of obscenity, threats, and racial and sexual insults. The court allowed the retaliation claim to go forward because the university offered no explanation of its handling of the employee's internal appeals denials other than that she was dismissed for legitimate reasons.

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[99] Ohio Civil Rights Comm'n v. Kent State Univ., 717 N.E.2d 745 [138 Educ. L. Rep. 492] (Ohio Ct. App. 1998).

[100] Rubinstein v. Administrators of Tulane, 58 F. Supp.2d 702 [138 Educ. L. Rep. 233] (E.D. La. 1998).

In Pennsylvania, a tenured male professor filed a Title VII sex discrimination claim against a private university alleging that he was removed as department chair due to a female professor's claim of sex discrimination. The professor also brought a claim under Section 1983. A trial court granted the university's motion for summary judgment.[102] The court reasoned that the professor failed to show that the reason for his dismissal was due to unlawful discrimination. The court declared the university asserted that the reason for the termination was the professor's failure to cooperate with the ongoing investigation of the female professor's claims.

A female field hockey coach alleged that her university violated Title VII because she was fired due to her gender, as well as complaints she had made about the team's practice field, and that the university violated Title IX by treating her differently than male coaches. A federal trial court in Ohio granted the university's motion for dismissal.[103] The court was of the opinion that the coach failed to produce any direct evidence of discrimination. The court reasoned that under Title VII, the plaintiff has the burden of proof to establish a showing of discrimination, and that the coach was unable to do so. The court was satisfied that the university proffered evidence of a legitimate reason for the dismissal, namely complaints by the team's members regarding the coach. Lastly, the court noted that the coach showed no evidence of a causal connection between her complaints and her dismissal.

Two female campus police officers in Virginia alleged discrimination on the part of the university when they were not promoted and were later discharged. Both claimed that their failure to be promoted was due to discrimination based on comments allegedly made by the police chief claiming that he would not send any female officers to the police academy. A jury found for the university and the Fourth Circuit affirmed.[104] In regard to the first officer, the court reasoned that she did not make a prima facie case for discrimination because she was not qualified for the position as evidenced by a an unsatisfactory performance evaluation. Further, the court observed that the male officers who were promoted were qualified. As for the discharge claim, the court explained that the officer who was fired for attending a fraternity party failed to provide evidence that she was treated differently from male officers who may have fraternized with students. In regard to the second officer, the court remarked there was no evidence that she was not promoted due to discrimination since another officer outperformed her on the promotion exam. The court added that many male officers were with the department for a period of time longer than the female officer without having been promoted.

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[101] Roman v. Cornell Univ., 53 F. Supp.2d 223 [136 Educ. L. Rep 855] (N.D. N.Y. 1999).

[102] Brogan v. La Salle Univ., 70 F. Supp.2d 556 [140 Educ. L. Rep. 155] (E.D. Pa. 1999).

[103] Weaver v. Ohio State Univ., 71 F. Supp.2d 789 [140 Educ. L. Rep. 184] (S.D. Ohio 1999).

Sexual Harassment

A female researcher obtained several federal grants and renewals under the assumption that her university would hire her as a full-time faculty member. When she was not hired, the researcher filed suit against the institution alleging sexual harassment by a number of male faculty members. In an attempt to evade their responsibility as the primary employer by the university, a federal trial court in New York offered that both the researcher and the university directly benefited from the grant resources that she obtained. Due to the reciprocal benefit bestowed upon the researcher and the university, the court concluded that since an employment relationship did in fact exist, the university was not entitled to a grant of summary judgment.[105]

In New York, a female African American professor sued Vassar College claiming Title VII racial and sexual discrimination after she was denied promotion to full professor. The Second Circuit held that the university's use of low teaching evaluations was sufficient in denying her promotion. The court was also of the opinion that the plaintiff failed to show discrimination through her use of statistical evidence.[106]

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[104] Taylor v. Virginia Union Univ., 193 F.3d 219 [139 Educ. L. Rep. 25] (4th Cir. 1999).

[105] Pemrick v. Stacher, 67 F. Supp.2d 149 [139 Educ.L.Rep. 467](E.D.N.Y. 1999). [106] Bickerstaff v. Vassar College, 196 F 3d 435 (2nd cr. 1999), cert. Denied, 120 S. Ct. 2688 (2000).

A guidance counselor brought a Title VII claim against a college's chancellor on the basis of sexual harassment. An appellate court affirmed a grant of summary judgment in favor of the Chancellor.[107] The court held that the actions of the chancellor, in the form of repeated unwanted phone calls of a friendly nature with no explicit sexual overtones, did not rise to the level of harassment necessary to establish a Title VII claim. The court reasoned that sexual harassment that does not involve extortion but involves the creation of a hostile environment which is severe enough to make the workplace intolerable for the person who is being discriminated against.

Race

In the District of Columbia, a university employee unsuccessfully filed a complaint alleging discrimination on the basis of race with the Department of Human Rights (DHR). DHR issued a notice of a right to sue which had to be acted on within ninety days. The employee then filed a Title VII claim which was received on the ninetieth day, but filed on day ninety-one. After a trial court dismissed the complaint as time-barred, an appellate panel reversed.[108] The court judged that the filing period begins upon receipt of the notice to sue, which is presumed to be three days after it is mailed. The court concluded that since the University failed to show the date that the right to sue letter was received on some other date, summary judgment was precluded.

Gender Discrimination

A college police officer brought a Title VII claim against the college alleging gender discrimination. The officer claimed that a fellow female officer harassed him and that his complaint led to his not being promoted to chief. On motions for summary judgment, the court held that since actions of the female officer, though immature and inappropriate, did not rise to the level of intimidation or threat, and did not constitute sexual harassment.[109] The court additionally held that there was no retaliation since the officer did not meet the minimum educational requirements of police chief.

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[107] Minor v. Ivy Tech State College, 174 F.3d 855 [134 Educ. L. Rep. 778] (7th Cir. 1999).

[108] Perry v. Gallaudet Univ., 738 A.2d 1222 [138 Educ. L. Rep. 1112] (D.C. 1999).

[109] Odom v. St. Louis Community College, 36 F. Supp.2d 897 [133 Educ. L. Rep. 461] (E.D. Mo. 1999).

Punitive Damages

A female university employee alleged sex discrimination, in violation of Section 1983, and battery against the university and its former chancellor. The basis for the claim was an incident in which the chancellor forcefully kissed and fondled the employee. A jury found in favor of the employee on all counts, awarding her $5,157 in compensatory damages and $800,000 in punitive damages against the chancellor. Thereafter, the employee moved to amend the judgment to include the compensatory judgment against the university since the jury also found it liable. The chancellor moved for a new trial, arguing that the trial should have been bifurcated and that the damages were excessive. The trial court held that it was within the discretion of the jury, based on the jury instructions to which the employee acquiesced, to assign damages as it did.[110] As to regard to the chancellor's motion, the court held that bifurcation was not warranted since it would have been inconvenient. The court also reasoned that any prejudicial testimony was accompanied by a limiting instruction, and thus did not render the trial unfair. Concerning the damages issue, the court first noted that award of damages for separate state and federal claims is not duplicative. However, the court found that the damages award was excessive based on the relatively low reprehensibility of the conduct. As a result, the court ordered the employee to accept a total award of $50,000, and, if she did comply, it wrote that a new trial would be held solely on the damages issue.

Americans with Disabilities Act

Four non-tenured professors claimed that the decision of a university for deaf students not to offer them faculty positions was in retaliation for their support of the "Deaf Empowerment" movement. The professors alleged that failure to hire them violated the Americans with Disabilities Act, as well as their First and Fifth Amendment Rights. These last two counts were based on the fact that the university, though private, relied on the federal government for funding and that its board of directors included three Congressionally appointed members. The professors asserted that these facts made the university a federal actor. The university successfully filed a motion to dismiss.[111] The court determined that although the government was involved in the creation and purpose of the university, the government did not control it, as only three of the twenty-one members of the board of directors were governmentally appointed. The court also dismissed the professors' contention that the university has a symbiotic relationship with the government, since the government played no part in the refusal to hire the professors. Lastly, the court dismissed one of the ADA claims on the ground that the professor, who was deaf, did not request an interpreter during her interview.

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[110] Fall v. Indiana Univ. Bd. of Trustees, 33 F. Supp.2d 729 [132 Educ. L. Rep. 456] (N.D. Ind. 1998).

[111] Becker v. Gallaudet Univ., 66 F. Supp.2d 16 [139 Educ. L. Rep. 391] (D.C. 1999).

Employees

Nontenured Faculty

Breach of Contract

An instructor at a state university in Arkansas filed suit against the board of trustees and others claiming a variety of claims including breach of contract, promissory estoppel, constructive fraud, and also seeking an injunction against the university prohibiting it from enforcing a policy requiring a doctoral candidates to complete their programs within seven years.[112] The university asserted Eleventh Amendment protection against the legal claim and the Arkansas Supreme Court agreed. The court held that the evidence was not sufficient for the judiciary to interject into the state's sovereign immunity to change or limit academic policy.

When a community college was forced to compensate a former employee after it withheld wages during a grievance, officials petitioned to an appellate court to change the unfavorable decision.[113] According to the previous arbitration award, the college acted in violation of the collective bargaining agreement by retaining the employee's wages. The court ruled that the dismissal was appropriate and that the former employee had to return any wages that he collected beyond the date of dismissal.

In another breach of contract case, a faculty member challenged a ruling that the college was not compelled to inquire into other sexual harassment complaints against other faculty members.[114] An appellate panel in New York affirmed the court's refusal to compel the college to conduct the exploratory inquiry.

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[112] Grine v. Board of Trustees, 2 S.W.3d 54 [140 Educ. L. Rep. 410] (Ark. 1999).

[113] In. re. County of Rensselaer, 692 N.Y.S.2d 758 [136 Educ. L. Rep. 1018] (N.Y. App. Div. 1999).

[114] Palma v. Iona College, 686 N.Y.S.2d 459 [133 Educ. L. Rep. 1010] (N.Y. App. Div. 1999).

Denial of Payment

During the 1990s, state legislatures began eliminating employee and teacher payments for unused vacation. In some states, employees were only allowed to accrue a maximum of thirty days. In a case involving a former community college teacher who sought to regain payment for unused vacation, an appellate court in New York held that the college was not estopped from refusing payments for unused vacation days.[115] The faculty member unsuccessfully claimed that she was entitled to the payments because it was prior college practice.

Discrimination

A former non-tenured faculty member asserted that a university discriminated against her by not renewing her annual contract.[116] She alleged that the nonrenewal was in retaliation for her vocal opposition to a faculty member who was dismissed in an earlier departmental decision and not based on academic merit. A federal trial court in Arizona held that the faculty member failed to demonstrate irreparable injury which is required to receive injunctive relief in discrimination cases. The court also indicated that the faculty member failed to demonstrate a likelihood of success based on academic merit.

Denial of Tenure

After a former faculty member in Florida was denied tenure, he sued the university for monetary damages claiming a breach of procedural rules. An appellate court affirmed that evidence supported the university's denial of tenure despite an overall reluctance on the part of the court to determine academic merit.[117] Traditionally, in cases involving merit-based tenure denials, the courts have ruled that they are not qualified to judge the merit of faculty members at academic institutions. In the absence of a significant breach of contract or established procedural rules, outright corruption or similar misconduct, or a claim of unconstitutional discrimination, the court concluded that the university's tenure decision had to stand.

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[115] Karp v. North Country Community College, 685 N.Y.S.2d 819 [133 Educ. L. Rep. 555] (N.Y. App. Div. 1999).

[116] Ogunleye v. Arizona, 66 F. Supp.2d 1104 [139 Educ. L. Rep. 452] (D. Ariz. 1999).

[117] Kumbhojkar v. University of Miami, 727 So. 2d 275 [133 Educ, L. Rep. 293] (Fla. Dist. Ct. App. 3 Dist, 1999).

First Amendment Speech

In Colorado, a professor who was denied promotion and tenure sued the Board of Trustees for violating his First Amendment rights to freedom of speech and association. An appellate court held that the critical speech used by the professor to address many university administrative decisions were in fact matters of public concern. In balancing the plaintiff's interests against the university's interests, the court reversed and was remanded for further consideration.[118]

In a case involving a retired former tenured faculty member, he filed suit against a university after he was denied an appointment as Professor Emeritus and refused laboratory space.[119] The plaintiff alleged that the actions on the part of the university to end a thirty-three year professional relationship was a retaliatory response to his frequent criticisms of the school's administration. According to the retired professor, this violated his First Amendment right of free speech and his Fourteenth Amendment due process rights. The federal trial court ruled that since the professor had little evidence to base any of his allegations in New Jersey, the university's motion for summary judgment should be granted dismissing the case.

Title VII Discrimination

In a highly contested area of judicial concern, 1999 witnessed numerous cases involving faculty members who sought redress against institutions of higher education due to racial, gender, nationality, or age discrimination after they were denied tenure. In the first case, a professor sued a private college in Virginia after he was denied tenure and terminated. The plaintiff alleged that he was discriminated against on account of his age, gender, ethnicity, and religion in violation of Title VII of the Civil Rights Act.[120] He also asserted state claims for negligence, breach of contract, and defamation. The college moved the case to federal court. The court held that the plaintiff failed to commence proceedings in a timely manner and so granted the college's motion for summary judgment. At the same time, the court also decided that the plaintiff could pursue state claims in the Circuit Court.

A former professor who was initially denied tenure sued the university for gender and national origin discrimination in violation of Title VII. The

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[118] Cotter v. Board of Trustees of the Univ. of N. Colo., 971 P.2d 687 [132 Educ. L. Rep. 216] (Colo. Ct. App. 1998).

[119] Shovlin v. University of Medicine and Dentistry of N. J., 50 F. Supp.2d [136 Educ. L. Rep. 328] (D.N.J. 1998).

[120] Edelman v. Lynchburg College, 66 F. Supp.2d 777 [139 Educ. L. Rep. 445] (W.D.Va. 1999).

Sixth Circuit affirmed a grant of court's summary judgment in favor of the university since a dean's decision against promotion and tenure did not constitute adverse employment action.[121]

In two separate cases, former university professors brought action against their institutions and leading administrative officers after they asserted that discrimination in race, gender, and national origin occurred in violation of ADEA and the Civil Rights Act. The federal trial court in Puerto Rico ruled for the plaintiff since the university had violated numerous regulations.[122] In a second case from Puerto Rico, the federal trial court systematically evaluated the evidence for the tenure decisions of several faculty members.[123] The court granted the institution's motion for summary judgment on title VII claims dealing with race, national origin, and sex discrimination.

In two sexual harassment claims, an associate professor in New York who was denied tenure brought an age and sexual discrimination claim against the City College. A federal trial court found that the professor could not establish a claim of retaliation against the college and a motion for summary judgment was granted to the college.[124] When a professor at a private university in Puerto Rico was denied tenure, she sued claiming sexual harassment, retaliation, and hostile environment. The federal trial court stated that the professor had not established cognizable claims under Title VII for quid pro quo or hostile environment.[125]

Contract Issues

After an assistant professor was denied tenure at Kansas State University, he filed suit against the institution and several officials asserting tortious contract interference and gender discrimination. The federal trial court granted the university's motion for summary judgment because the tenure denial and officials involved with the decision did not violate the plaintiff's due process rights and did not discriminate based on race and gender.[126]

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[121] Dobbs-Weinstein v. Vanderbilt Univ., 185 F.3d 542 [137 Educ. L. Rep. 208](6thCir. 1999).

[122] Boateng v. Interamerican Univ., 36 F.Supp.2d 60 [133 Educ. L. Rep. 119] (D. Puerto Rico 1998).

[123] Mandavilli v. Maldonado, 38 F. Supp. 2d 180 [133 Educ. L. Rep. 858] (D. Puerto Rico 1999).

[124] Peterson v. City College, 32 F. Supp. 2d 675 [132 Educ. L. Rep. 321] (S.D.N.Y. 1999).

[125] Loring v. Universidad Metropolitana, 62 F. Supp.2d 450 [138 Educ. L. Rep. 1016] (D.Puerto Rico 1999).

[126] Babbar v. M. Ebadi, 36 F. Supp.2d 473 [133 Educ. L. Rep. 1269] (D.Kan. 1998).

False Claims Act (Retaliatory Claims)

A tenure track professor alleged a violation of the False Claims Act retaliation provision by selected university faculty when he was denied tenure. The plaintiff maintained that the faculty members denied him tenure in retaliation for claiming grant fraud in an NIH research project. A federal trial court in Texas ruled that the professor's claim was invalid because the named defendants were not the professor's employer which is a necessary provision. Further, the court reasoned that the retaliation provision of the False Claims Act only applied to employees who were able to demonstrate that they suffered from adverse employment action due to their lawful actions in identifying illegal activity.[127]

Tenured Faculty

Breach of Contract

Where a former professor brought action against a state university and a departmental chair in Illinois for violating his First Amendment rights and tortious interference with contract, an appellate court reversed an earlier judgment on behalf of the former faculty member. The court ruled that the department chair was protected under Eleventh Amendment sovereign immunity and that the failure to renew the faculty member's contract was not a retaliatory response to protected speech.[128]

In the first of two cases involving the university's failure to provide a legal defense for faculty members, a professor brought a tortious breach of contract action against it in connection with intellectual property litigation in which the university was a defendant.[129] The Supreme Court of Hawaii upheld the university's motion for summary judgment but also permitted the professor to file a grievance in the administrative forum.

The second case involved a physician on the faculty of a state university who sought to force the institution to defend to him in a civil action brought by a patient who alleged that he had engaged in "egg stealing" and other improprieties.[130] An appellate court in California reversed a finding that the Board of Regents did not abuse its discretion in refusing to defend the professor.

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[127] Miller v. Bunce, 60 F. Supp.2d 620 [138 Educ. L. Rep. 395] (S.D. Texas 1999).

[128] Feldman v. Ho, 171 F.3d 494 [133 Educ. L. Rep. 413] (7th Cir. 1999).

[129] Hokama v. University of Hawaii, 990 P.2d 1150 [140 Educ. L. Rep. 1030] (Hawaii 1999).

[130] Stone v. Regents of Univ. of Cal., 92 Cal.Rptr.2d 94 [140 Educ. L. Rep. 1012] (Cal. Ct. App. 4 Dist. 1999).

In California, a group of tenured professors sued the university and its patent licensee alleging breach of contract and various torts. The dispute arose after the invention of a particular kind of magnetic resonance imaging technique ("MRI"). The plaintiffs conceived of this MRI method while they were employed in the late 1980s at the University of California at San Francisco (UCSF). During the course of their employment at UCSF, the plaintiffs alleged they discovered a new way to use contrast agents to conduct a particular imaging technique. This method was ultimately patented and the University reached a licensure agreement with a private company. The professors contended that the institution failed to conduct a proper investigation into the nature and origin of the invention, thereby leading to a licensing agreement that was grossly one-sided and constituted a breach of contractual obligations to the inventors. After cross-motions for summary judgment were filed, a federal trial court ruled that the university did not breach its contractual obligation to the faculty members, even if it did sign away rights to the patent for substantially less than those rights were worth. The court also held that the professors lacked standing in seeking correction of inventorship and factual evidence was not sufficient enough to advance tort claims by the plaintiffs.[131]

Dismissal for Cause

A tenured faculty member who was dismissed for cause filed contract and tort type claims against the State Board of Higher Education. After a trial court judge refused to dismiss the case, the Board sought further review.[132] The Supreme Court of North Dakota reversed in noting that the trial court lacked subject matter jurisdiction to hear the case and that the tort claims were barred by statute of sovereign immunity.

All Employees

Breach of Contract

In Hawaii, a faculty union procured an injunction against the state to prohibit it from implementing paycheck delays pursuant to a statutory scheme devised to convert the payment system from a predicted payroll to an after-the-fact payroll. After the federal trial court in Hawaii granted the injunction, the state appealed based on its claim that the new system could save $51 million by rolling over salaries to the next fiscal year. In affirming, the Ninth Circuit first determined that a contractual relationship existed between the plaintiffs and the state. Thus, the court viewed the state statute as representing a substantial impairment of parties' collective bargaining agreement for Contract Clause purposes. Second, the court held that state has used its law-making powers not merely to breach its contractual obligations, but to create a defense to the breach that prevents the recovery of damages. Third, the court agreed that the preliminary injunction was warranted because the state failed to demonstrate the necessity to fulfill an important public purpose in light of a state budgetary crisis which is essential in breaking contractual obligations.[133]

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[131] Kucharczyk v. Regents of Univ. of Cal., 48 F.Supp.2d 964 [136 Educ. L. Rep. 268] (N.D.Cal. 1999).

[132] Dimond v. State Bd. of Higher Educ., 603 N.W.2d 66 [139 Educ. L. Rep. 1050] (N.D. 1999).

In another employee breach of contract case, a former state college administrator in Indiana unsuccessfully sued seeking reinstatement after he was fired. An appellate court held that the breach of contract claim failed on many counts.[134]

A former medical school professor in New York alleged breach of contract and brought action against his university. In a rare motion favoring the professor's right to advance a liability claim against the university, an appellate court held that the institution could not obviate their contractual obligation to provide a twelve-month notice prior to his termination just because the funding for the position was provided by private sources.[135]

Administration and Staff

First Amendment Speech

An assistant dean who was dismissed sued the chancellor of a public university alleging the termination was in retaliation for protected speech. The Seventh Circuit affirmed a grant of judgment in favor of the university. The court ruled that there was little evidence to support a claim that the dismissal was a retaliatory decision on the part of university administrators.[136]

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[133] University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 [137 Educ. L. Rep. 77] (9th Cir. 1999).

[134] Orem v. Ivy Tech State College, 711 N.E.2d 864 [135 Educ. L. Rep. 628] (Ind. Ct. App. 1999).

[135] Wenz v. Albert Einstein College of Med.,695 N.Y.S.2d 391[138 Educ. L. Rep. 471] (N.Y. App. Div. 1999).

[136] Roberts v. Broski, 186 F.3d 990 [137 Educ. L. Rep. 462] (7th Cir. 1999).

Due Process

An administrative employee of a state university sued several colleagues for violating his constitutional right to due process after being disciplined. The Supreme Court of Wisconsin affirmed that even though the employee had established property interests that were protected by the due process clause, the defendants were entitled to qualified immunity because it was reasonable to assume that the public officials involved were unaware that a presuspension hearing was necessary.[137]

In Alabama, when a residence hall night coordinator was charged with sleeping on the job a second time, the university sought her dismissal. A hearing officer concluded that there was insufficient evidence to prove that the employee was sleeping and recommended that she not be dismissed. The President rejected this recommendation and commenced another hearing which the employee refused to participate in other than to appear to object to the authority of the university to conduct a second hearing. Without the full participation of the employee, the second hearing officer recommended her dismissal that she subsequently challenged. A federal trial court denied the university's motion for summary judgment.[138] The court held that the president's rejection of the first hearing officer's recommendation of reinstatement did establish a deprivation of a property interest without notice of a hearing. The judge also concluded that there were no viable state procedures available to the employee to obtain appropriate procedural protection pending the job dismissal.

A tenured state university professor sought judicial review of the university's decision to place him on paid administrative leave pending resolution of sexual harassment charges against him. A trial court ordered that the university conduct a hearing before placing the professor on leave. The Supreme Court of Iowa reversed, holding that the professor had no due process right to a hearing because he was not deprived of any constitutional interest by being put on leave.[139]

A professor claimed that his university breached is contract in resolving sexual harassment claims against him, thereby causing him financial and mental injury. The professor premised this claim on the existence of the university's procedures forming the basis for an implied agreement between he and the university. A trial court entered summary judgment for the university and an appellate court affirmed. On further review, the Court of Appeals of New York affirmed.[140] The court reasoned that the university's following its own procedures is not a matter for the court to review but one that the university is to monitor. Regardless, the court held that the university was not contractually bound to follow its procedures because it hired the professor.

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[137] Arneson, v. Jezwinski, 592 N.W.2d 606 [134 Educ. L. Rep. 336] (Wis. 1999).

[138] Carter v. Harris, 64 F. Supp.2d 1182 [139 Educ. L. Rep. 319] (M.D. Ala. 1999).

[139] Simonson v. Iowa State Univ., 603 N.W.2d 557 [140 Educ. L. Rep. 754] (Iowa 1999).

Contract Issues

In Pennsylvania, an employee union brought action on behalf of a state university probationary employee after he was dismissed. At issue was a dispute regarding a violation of the collective bargaining agreement on the part of the university. The Pennsylvania Supreme Court upheld an arbitrator's decision as being within the terms of the collective bargaining agreement.[141]

A community college obtained a policy from an insurance company insuring against wrongful acts committed by its officers. The treasurer of the school convinced the board of trustees to invest $2 million of its endowment into a new business, which unbeknownst to the board, he co-owned. After the investment failed, the college unsuccessfully filed a claim with the insurance company for the loss. The insurance company denied the claim on the basis of a "personal profit or advantage" exclusion in the policy. A federal trial court in Texas agreed with the company and the Fifth Circuit affirmed.[142] The court reasoned that the investment of the money in the treasurer's company fell within the exclusion because, though it did not ultimately profit, the large investment was certainly advantageous.

In New Mexico, an assistant basketball coach brought a breach of implied contract and due process claim against the Board of Regents after he was dismissed. An appellate court held that in light of whether the coach had non probationary status, thereby making any right to due process uncertain, the athletic director was entitled to a grant of summary judgment.[143]

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[140] Maas v. Cornell Univ., 699 N.Y.S.2d 716 [140 Educ. L. Rep. 711] (N.Y. 1999).

[141] State Sys. of Higher Educ. v. State College, 743 A.2d 405 [140 Educ. L. Rep. 994] (Pa. 1999).

[142] Jarvis Christian College v. National Union Fire Ins. Co., 197 F.3d 742 [140 Educ. L. Rep. 105] (5th Cir. 1999).

[143] Cockrell v. Board of Regents of N. M. State Univ., 983 P.2d 427 [137 Educ. L. Rep. 828] (N.M. App. 1999).

Discrimination

In New York, a student alleged that directors of a graduate program that he was in sought to dismiss him both as an employee and as a student. The compliant asserted that his contract was terminated after complaining to central administration about the abusive language used by white teachers at the school to children of color. The defendants sought a motion to dismiss because of the lack of evidence supporting a civil rights and conspiracy claim against the college. A federal trial court, in finding that the plaintiff provided little factual evidence to support his claim, granted the motion to dismiss to the college.[144]

Dismissal for Cause

When a former university professor and assistant to the President of the American Heritage Center were terminated for just cause, he sued the institution, university president, and board of trustees. The plaintiff claimed that his dismissal was a retaliatory response after he was denied access to numerous university documents. The professor asserted that the university violated its procedures and the Public Records Act. The Supreme Court of Wyoming partially ruled in partial favor of the plaintiff with regard to the Public Records Act, holding that as a state agency, the university was required to promulgate rules under the Administrative Procedure Act.[145]

A university in Tennessee sued a former head football coach for liquidated damages alleging breach of employment contract after he accepted another job before fulfilling a five-year contractual obligation. The university presented evidence that it incurred expenses of over $184,000 in recruiting the new coach and compensating the difference between coaching staffs. The Sixth Circuit affirmed that the university was entitled to liquidated damages.[146] The court added ruled that the coach's two-year employment extension was a viable part of his five-year employment contract and subject to the liquidation damages provision.

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[144] Watson v. Dominican College, 75 F. Supp.2d 222 [140 Educ. L. Rep. 639] (S.D.N.Y. 1999).

[145] University of Wy v. Gressley, 978 P.2d 1146 [135 Educ. L. Rep. 257] (Wyo. 1999).

[146] Vanderbilt Univ. v. Dinardo, 174 F.3d 751 [134 Educ. L. Rep. 766] (6th Cir. 1999).

Denial of Employee Benefits

When a Public Employees' Retirement Association changed its benefits plan denying a professor of anticipated benefits, he unsuccessfully claimed that his procedural rights to due process were violated. An appellate court in Colorado affirmed the dismissal of the case on the ground that the faculty member received all of the process that he was due.[147]

In a case involving a ruling that granted unemployment insurance benefits to an employee, a community college sought judicial review of a final decision by an insurance appeal board. An appellate court in New York reaffirmed that the claimant was entitled to the benefits because he had not been reasonably assured by the college of his status as a professor.[148]

Tort Liability

Negligence

The daughter of a woman who suffered brain damage due to a nurse's misdiagnosis brought a suit a university which was associated with the hospital. A trial court in Florida granted the university's motion for summary judgment. An appeals court affirmed, holding that pursuant to an affiliation agreement between the university and the hospital, the former would only be responsible for malpractice committed by university faculty physicians.[149] The injured woman unsuccessfully claimed that the hospital should be liable for emergency room protocols and nurse malpractice.

Intentional Inflection of Emotional Distress

In North Carolina, a university employee who was physically and sexually harassed by a fellow employee brought suit against the employee and the university for intentional infliction of emotional distress. A trial court awarded the employee punitive damages in the amounts of $5,000 from the employee and $500,000 from the university under a theory of vicarious liability. An appeals court upheld the award, deciding that the rule that an employer's derivative liability cannot exceed that of the employee does not apply to punitive damages.[150] The court further noted that there was enough evidence to justify the large award against the university dismissed, and that determination of punitive damages is at the discretion of the jury.

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[147] McInerney v. Public Employees' Retirement Ass'n, 976 P.2d 348 [134 Educ. L. Rep. 348] (Colo. Ct. App. 1998).
[148] Friedman v. Nassau Community College, 689 N.Y.S.2d 777 [135 Educ. L.Rep. 582] (N.Y. App. Div. 1999).
[149] Ramirez v. University of Miami, 739 So. 2d 1240 [138 Educ. L. Rep. 574] (Fla. Dist. Ct. App. 1999).

A professor who was dismissed for failure to publish brought suit against the university and three colleagues responsible for his negative evaluations claiming intentional infliction of emotional distress. The Supreme Court of Texas affirmed a grant of summary judgment in favor of the defendants.[151] The court reasoned that recovery for intentional infliction of emotional distress requires that the conduct in question be extreme and outrageous. The court acknowledged that dismissal by itself, even if unlawful, is not sufficient evidence that an employer's conduct was extreme and outrageous. Under the facts in this case, the court concluded that the behavior of the defendants did not rise to the level of extreme and outrageous conduct.

In an interesting twist of actors a university attempted to use a statute to create a private cause of action and prohibit the sale of term papers. The university brought action against the vendors of term papers under the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law. The university claimed that the papers were sold for the purpose of being submitted for credit as the original work of another, that the sales were tortious interference with university-student relations, and that the sales were acts of fraud. A trial court dismissed the claims.[152] The court held that the RICO claim failed because the person against whom a claim is brought must be an entity distinct from the enterprise whose affairs are at issue and that the wording of the university's complaint did not comply with this requirement. Under the state law claim, the court found that the law prohibiting the sale of term papers did not allow a private right of action.

Statutory Immunity

A university professor who alleged that she was refused an appointment because of her marital status initiated an action by sending a notice of claim to the Office of Management and Budget about eight months later. A trial court dismissed the action for failure to file a notice of claim and exhaust administrative remedies. On further review, the Supreme Court of North Dakota affirmed that the professor's claim was dismissed properly because she failed to exhaust administrative remedies and file a timely notice of claim.[153]

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[150] Watson v. Dixon, 511 S.E.2d 37 [132 Educ. L. Rep 1020] (N.C. Ct. App. 1999).

[151] Brewerton v. Dalrymple, 997 S.W.2d 212 [137 Educ. L. Rep. 393] (Tex. 1999).

[152] Trustees of Boston Univ. v. ASM Communications, Inc., 33 F. Supp.2d 66 [132 Educ. L. Rep 382] (D. Mass. 1998).

Qualified Immunity

A member of a university voluntary student military training organization brought an action under Section1983 against the student leaders of the organization and university officials, claiming that he was hazed in violation of his constitutional rights. A federal trial court in Texas grated the officials' motion for summary judgment on the basis of qualified immunity. The Fifth Circuit affirmed, holding that the conduct of the student leaders could not be attributed to the officials and that they could not beheld to have violated the member's due process right to bodily integrity without a showing of deliberate indifference.[154] The court reasoned that supervisory officers cannot be held liable under Section 1983 for the actions of subordinates under a theory of vicarious liability.

Defamation

A former head of a surgical department at a state university hospital brought a defamation action against the state and the hospital on the basis of statements made in regard to the suspension of the institution's heart transplant program. A trial court granted the university's motion for summary judgment. On further review, the Supreme Court of Kansas reversed, holding that factual issues remained regarding whether the doctor suffered damage to his reputation remained and whether the hospital administrators were immune from liability on the basis of qualified immunity.[155]

Workers Compensation

An employee of a county social services department who was injured by a light fixture which fell from the ceiling of a building owned by a university filed tort and workers' compensation claims. The state industrial commission found the university liable, and an appellate court in North Carolina affirmed.[156] The court held that since there was competent evidence to support the commission's decision, its decision should not be overturned. The evidence showed that the university owned the building and that one of its employees had worked on the fixture prior to the accident.

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[153] Cooke v. University of N. D., 603 N.W.2d 504 [140 Educ. L. Rep. 366] (N.D. 1999).

[154] Alton v. Texas A&M Univ., 168 F.3d 196 [132 Educ. L. Rep. 656] (5th Cir. 1999).

[155] Moran v. State, 985 P.2d 127 [138 Educ. L. Rep. 529] (Kan. 1999).

When a university employee injured his back, he was instructed by his supervisor not to return to work until obtaining a doctor's release. Six days later, he did so, and was dismissed for absenteeism. The employee then sued the university under the state workers compensation act, charging discrimination on the basis of filing a workers compensation claim. A trial court in Texas granted the university's motion for summary judgment and an appellate court affirmed.[157] The court reasoned that under the doctrine of sovereign immunity, the university, as an agency of the state, is immune from suit unless waived by the legislature. Under the language of the anti-retaliation provision of the labor code, the court observed that since the legislature did not waive sovereign immunity, the university was entitled to a grant of summary judgment.

Contract Liability

A union challenged the constitutionality of a statute which required public universities to create standards for workloads for professors and simultaneously exempting those standards from collective bargaining. The Supreme Court reversed the Supreme Court of Ohio's holding that the statute was unconstitutional. On remand, the Supreme Court of Ohio held that the Equal Protection Clauses of the state and federal constitutions were to be construed identically and that the former did not restrict the legislature's authority so as to allow passage of only laws that benefited employees.[158] Therefore, under the federal rational basis test, the court maintained that the law was valid under the state Equal Protection Clause because it was rationally related to a legitimate state interest, that of the education of students in public universities. The court further noted that there was nothing in the language of the state constitution requiring only laws benefiting employees to be passed.

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[156] Robinson v. East Carolina Univ., 514 S.E.2d 301 [134 Educ. L. Rep. 636] (N.C. Ct. App. 1999).

[157] Honhorst v. University of N. Tex., 983 S.W.2d 872 [132 Educ. L. Rep. 260] (Tex. App. 1998).

[158] American Ass'n of Univ. Professors, Cent. State Univ. Chapter v. Central State Univ., 717 N.E.2d 286 [138 Educ. L. Rep. 899] (Ohio 1999).

In New York, a small liberal arts college sued a contractor for breach of a construction management contract. An appellate court held that the statute of limitations barred the college from seeking action beyond the date on which the facility in question had been completed.[159] The court also ruled that the college failed to allege essential terms in a new contract for remedial work.

Where a professor had been employed under renewable one-year contracts for eight years, followed by non renewable one-year contracts for four years, he filed a breach of contract suit after not being offered employment for the fourth year. An appellate court in New York affirmed a grant of summary judgment in favor of the college.[160] The court held that the statute of limitations barred the breach of contract claim since it began to run the day he signed the first nonrenewable contract. The court applied the same reasoning to fraud and due process claims. The court further granted the individual officials summary judgment on the basis of official immunity. The court concluded that the officials acted with good faith and within the scope of their employment when they performed their discretionary duty of terminating the professor's employment since there was adequate evidence that a new contract was not warranted.

Conclusion

The case law reviewed in this chapter demonstrates that higher education continues to experience a profusion of litigation. The areas requiring significant legal attention included employee dismissal, discrimination, sexual harassment, and institutional authority. Other important issues involving student free speech and affirmative action remain only temporarily resolved and are expected to undergo further legal clarification in the near future. As far as colleges and universities are concerned, Eleventh Amendment immunity was frequently used and increasingly contested area that will no doubt also require additional clarification.

The consistent pattern in the high volume of litigation in higher education indicates that many of the areas of law remain unsettled and transformative. Understanding the patterns in case law and judicial opinions during this precarious legal period provides valued insight for institutional leaders, administrators, faculty, and students as they attempt to traverse the rugged and unpredictable terrain of the law of American higher education.

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[159] Barnard College v. Tishman Constr. Corp., 690 N.Y.S.2d 45 [135 Educ. L. Rep. 587] (N.Y. App. Div. 1999).

[160] Bates v. Texas State Technical College, 983 S.W.2d 821 [132 Educ. L. Rep 246] (Tex. App. 1998)

9

STUDENTS IN HIGHER EDUCATION

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Introduction

This chapter reviews more than 150 cases relating to students in higher education. The Supreme Court addressed race-based admissions and the applicability of title IX to the National Collegiate Athletic Association (NCAA). The balance of the federal cases examined bankruptcy or constitutional and statutory deprivations. The thrust of state cases continued to focus on torts and contractual liability.

Admission

The Supreme Court, in *Texas v. Lesage*,[1] reviewed a dispute filed by a student who was denied admission to a Ph.D. program at a public university. The student claimed that the university's race-based admissions policy violated the equal protection clause and federal statutes. In upholding a grant of summary judgment in favor of the university, the Court cited its own precedent in *Mt. Healthy*[2] that even if the government has considered an impermissible criterion in making a decision, it can nonetheless prevail by demonstrating that it would have acted the same way but for forbidden consideration.

In two separate cases, the federal trial court in Maine granted a university's motion for summary judgment in a case filed by a sixty-five-year-old applicant who was denied admission to a public law school. In the first case, the court denied the plaintiff's claims of a due process violation because there was only a unilateral expectation of admission, not an entitlement.[3] The court went on to reject contractual and various tort claims. A month later, the court rejected the applicant's equal protection claim, citing a lack of evidence of discriminatory intent and noting that six other applicants over the age of forty, each with higher standardized test scores, were admitted. [4]

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[1] 120 S.Ct. 467 [139 Educ. L. Rep. 791](1999).

[2] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[3] Tobin v. University of Me. Sys., 59 F.Supp.2d 87 [138 Educ. L. Rep. 267] (D. Me. 1999).

[4] Tobin v. University of Me Sys., 62 F. Supp.2d 162 [138 Educ. L. Rep. 770] (D. Me. 1999).

Title VI[5]

A federal trial court in Georgia addressed the constitutionality of racial preferences or dual-tracking in a public university's admissions policy when a white student who was denied admission claimed a title VI violation based upon impermissible racial discrimination.[6] Applying strict scrutiny, the court reviewed the admissions policy and determined that fostering a diverse educational setting was not narrowly tailored to justify discriminatory practices. The court held that university officials did not present evidence showing that a history of discrimination made it necessary to implement the admissions policy. Further, the court pointed out that a second student did not have standing since she did not meet objective admission criteria and would have been rejected regardless of racial considerations. About six months later, the same court issued a second opinion regarding the school's revised admission policy.[7] The court found that a white plaintiff did not have standing to bring suit since he could not show that he was otherwise qualified for admission even though the university may have considered his race at some point in the admissions process. However, the court was satisfied that evidence showed that the rejection of the application was not based on race.

When a white male was denied admission into a public university's medical school, he alleged numerous statutory and constitutional violations surrounding racially discriminatory admissions practices.[8] The federal trial court in Maryland, acting on a motion to dismiss, ruled that title VI claims apply only to institutions, not individuals, and that it was only necessary to prove discriminatory intent at trial, not necessarily plead it in the complaint. In addition, the court refused to dismiss the equal protection claim, asserting that injunctive relief was permissible under the Fourteenth Amendment.

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[5] Title VI of the Civil Rights Act of 1964 states that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" (42 U.S.C. § 2000d).

[6] Wooden v. Board of Regents of the Univ. Sys. of Ga., 32 F. Supp.2d 1370 [132 Educ. L. Rep. 367] (S.D. Ga. 1999). The University eliminated the dual-tracking preference in 1995.

[7] Tracy v. Board of Regents of the Univ. Sys. of Ga., 59 F. Supp.2d 1314 [138 Educ. L. Rep. 355] (S.D.Ga. 1999).

[8] Farmer v. Ramsay, 41 F. Supp.2d 587 [134 Educ. L. Rep. 840] (D. Md. 1999).

A final set of cases dealt with the issue of minority student groups seeking to intervene in suits that alleged a public institution's race-based admissions policy violated title VI and/or equal protection. The Sixth Circuit[9] and Ninth Circuit[10] addressed similar cases but reached different conclusions. The Sixth Circuit granted a motion to intervene on the basis that minority groups had a substantial interest in the subject matter of the litigation that would have been impaired if they were not made party to the case, and that the college could not adequately represent the groups' interests. Conversely, the Ninth Circuit maintained that minority students could not meet the timeliness factor for intervention since they could not satisfactorily explain why they waited fifteen months to file the motion to intervene.

Tuition and Fees

Two themes emerged in the tuition and fees cases litigated during the past year: determination of in-state tuition and the impact of mandatory student fees on student speech.

Appellate courts in two states addressed cases on in-state tuition. A student challenged the denial of his request for in-state resident status for the purpose of receiving in-state tuition rates. Focusing on the student's primary intent in coming to Oregon, an appellate court upheld the university's action because the student did not meet the statutory requirements of being financially independent and seeking residency for purposes other than education.[11] The court also ascertained that the student had to have a physical presence in the state for the preceding twelve months, not just own real property there.

In Indiana, an appellate court affirmed a grant of summary judgment in favor of a university where a student sought the monetary difference between in-state and nonresidential tuition.[12] The court decided that the plaintiff's equal protection claims had to be brought under section 1983 since government officials can only be sued for monetary damages in their individual capacities. Further, the court rejected the student's argument that his property, in the form of tuition, was unconstitutionally taken. The court posited that the student was actually asking for damages that are excluded under section 1983 against government officials in their official capacities.

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[9] Grutter v. Bollinger, 188 F.3d 394 [137 Educ. L. Rep. 907] (6th Cir. 1999).

[10] Smith v. Marsh., 194 F.3d 1045 [139 Educ. L. Rep. 151] (9th Cir. 1999).

[11] Polaski v. Clark, 973 P.2d 381 [133 Educ. L. Rep. 257] (Or. Ct. App. 1999).

[12] Benedetto v. Indiana Univ., 707 N.E.2d 1062 [133 Educ. L. Rep. 237] (Ind. Ct. App. 1999).

A second line of cases addressed the constitutionality of mandatory fees used to support organizations with political or ideological messages with which some students disagreed. In the Eighth Circuit, student groups in Minnesota who received funding sought to intervene in a suit challenging the constitutionality of student fees. The court denied the request to intervene on the basis that the groups did not suffer an injury since they could not compel students to support them financially.[13] Further, the court was convinced that the university adequately represented the groups' interest since both the university and the organizations desired to retain the fees. Shortly thereafter, the Ninth Circuit examined a First Amendment challenge to student fees in Oregon. After resolving issues surrounding Eleventh Amendment immunity, the court upheld the fees as constitutional since the court did not view the fees as affording automatic membership or see view them as compelling speech to support a student group.[14] Moreover, the court indicated that fees were germane in an academic setting, and that an elaborate system was in place to ensure that they furthered student development.

The child of a deceased faculty member sought reimbursement for the university's failure to honor tuition waivers for faculty members' children.[15] An appellate court in Louisiana believed that since the faculty handbook provision on waivers was contractual, it was something that the faculty member reasonably relied upon before his death. The court reflected that after all conditions were met to qualify for the tuition waiver, it became a property interest in the form of deferred compensation.

A public university sought past due tuition payments from a student who completed an early graduation program. Rejecting the student's argument for accord and satisfaction, an appellate court in Arkansas observed that there was no agreement declaring a settlement of past-due tuition in exchange for early completion.[16]

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[13] Curry v. Regents of the Univ. of Minn., 167 F.3d 420 [132 Educ. L. Rep. 300] (8th Cir. 1999).

[14] Rounds v. Oregon State Bd. of Educ., 166 F.3d 1032 [132 Educ. L. Rep. 72] (9th Cir. 1999).

[15] Fairbanks v. Tulane Univ., 731 So.-2d 983 [135 Educ. L. Rep. 284] (La. Ct. App. 1999).

[16] Helms v. University of Mo.-Kansas City, 986 S.W.2d 419 [133 Educ. L. Rep. 615] (Ark. Ct. App. 1999).

Bankruptcy

Students seeking to discharge their student loans via bankruptcy proceedings was the most frequently litigated topic in higher education.[17] Pursuant to 11 U.S.C. § 523(a)(8) of the Bankruptcy Code,[18] a discharge in bankruptcy will not excuse an individual debtor from liability for the repayment of an educational loan[19] made or guaranteed by a governmental unit, unless repayment of the loan "will impose an *undue hardship* on the debtor and the debtor's dependents."[20] This can be accomplished via numerous bankruptcy procedures, but most typically student debtors utilize what is commonly referred to as Chapter 7[21] or Chapter 13[22] bankruptcy.

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[17] During 1999, the federal judiciary ruled on more than fifteen cases that addressed the application of section 523(a)(8) to a particular debtor seeking to discharge their student loan obligation. *See In re* Vinci, 232 B.R. 644, 651 [134 Educ. L. Rep. 195] (E.D. Pa. 1999); *In re* Thomsen, 234 B.R. 506 [135 Educ. L. Rep. 154] (Bankr. D. Mont. 1999); *In re* Powers, 235 B.R. 894 [135 Educ. L. Rep. 985] (Bankr. W.D. Mo. 1999); *In re* Luna, 236 B.R. 291 [136 Educ. L. Rep. 428] (Bankr. M.D. Fla. 1999); *In re* Perry, 239 B.R. 801 [138 Educ. L. Rep. 822] (Bankr. W.D. Ark. 1999); *In re* Clark, 240 B.R. 758 [139 Educ. L. Rep. 528] (Bankr. W.D. Mo. 1999); *In re* Chambers, 239 B.R. 767 [138 Educ. L. Rep. 437] (Bankr. N.D. Ohio 1999); *In re* Salinas, 240 B.R. 305 [138 Educ. L. Rep. 834] (Bankr. W.D. Wis. 1999); *In re* Peel, 240 B.R. 387 [138 Educ. L. Rep. 847] (Bankr. N.D. Cal. 1999); *In re* White, 243 B.R. 515 [140 Educ. L. Rep. 960] (Bankr. N.D. Ala. 1999); *In re* Hornsby, 242 B.R. 647 [140 Educ. L. Rep. 953] (Bankr. W.D. Tenn 1999); *In re* Young, 237 B.R. 139 [136 Educ. L. Rep. 906] (Bankr.N.D.Ohio 1999); *In re* Elmore, 230 B.R. 22 [132 Educ. L. Rep. 482] (Bankr. D. Conn. 1999); *In re* Markley, 236 B.R. 242 [136 Educ. L. Rep. 420] (Bankr. N.D. Ohio 1999).

[18] In 1998, Congress amended § 523 by removing subsection (A) which provided that an educational loan was not dischargeable unless it "[f]irst became due more than seven years before the date of the filing of the petition." However, this amendment was not retroactive and is only effective for bankruptcy cases filed on or after October 7, 1998 (Pub.L. No. 105-224, § 971(a), 112 Stat. 1581). Bankruptcy courts have ruled that a forbearance or loan consolidation served to suspend the repayment period of a loan such that a debtor's first note became due less than seven years prior to the filing of a bankruptcy petition. *In re Perry*, 239 B.R. 801 [138 Educ. L. Rep. 822] (Bankr.W.D. Ark. 1999), *In re* White, 229 B.R. 34 [131 Educ. L. Rep. 1022] (Bankr. M.D. Fla. 1999).

[19] Specifically, 11 U.S.C. § 523(a)(8) provides that this title does not discharge a debtor from any debt for educational benefit overpayent, loan, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend.

[20] (Emphasis added) Section 523(a)(8) is not self-effectuating. A debtor must bring an adversary proceeding to determine whether a student loan debt is dischargeable under that provision. *In re* Kahl, 240 B.R. 524 [139 Educ. L. Rep. 515] (Bankr. E.D. Pa. 1999).

In New York, a federal trial court decreed that a student must receive a loan before a court can consider it nondischargeable in bankruptcy.[23] According to the court, the college did not make a loan to a student debtor within the meaning of the nondischargeability provision simply by allowing him to attend classes without prepaying tuition. The court acknowledged that the student neither signed a promissory note nor realized that he was receiving an extension of credit.

A federal bankruptcy court in the District of Columbia judged that "the statute [for loan discharge] plainly is not satisfied by a simple showing of an educational loan. Instead, the statute additionally requires showing that the loan 'was made under a program funded . . . by the university.'"[24] The student was allowed to continue to receive room and board on credit after she failed to make payments during her first semester. The court commented that after the first semester these expenses were not part of the university's educational program.

Two lines of cases questioned what constituted an educational loan. Courts in two states addressed student debtors who tried to escape the nondischargeability of section 523(a) by claiming that loans were consolidations of previous student loans, not educational loans. Both courts rejected the claims. The court in Texas offered that such an argument " . . . conflicts with the legislative intent behind this discharge exception."[25] Parent debtors in Michigan unsuccessfully argued that loans taken to finance the schooling of children were not educational loans.[26] The court reasoned that most jurisdictions interpret section 523(a)(8) as still applicable regardless of whether a borrower, here the parents, is the direct beneficiary of the loan.[27]

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[21] 11 U.S.C. §§ 101-1330.

[22] 11 U.S.C. § 1328(a)(2) provides, in relevant part, that, "[a]s soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt . . . of the kind specified [in § 523(a)(8)]."

[23] College of Saint Rose v. Regner, 229 B.R. 270 [132 Educ. L. Rep. 148] (N.D.N.Y. 1999).

[24] *In re* Pelzman, 233 B.R. 575, 577 [134 Educ. L. Rep. 520] (D.C. 1999). Citing Santa Fe Med. Servs., Inc. v. Segal, 57 F.3d 342, 347-48 (3rd Cir. 1995).

[25] *In re* Shaffer, 237 B.R. 617, 620 [137 Educ. L. Rep. 296] (Bankr. N.D. Tex. 1999).

[26] *In re* Flint, 238 B.R. 676 [137 Educ. L. Rep. 730] (E.D. Mich. 1999).

[27] New York State Higher Educ. Servs. Corp. v. Kaplan, 684 N.Y.S.2d 356 [132 Educ. L. Rep. 868] (N.Y.App.Div. 1999); *In re* Norris, 239 B.R. 247 [137 Educ. L. Rep. 1011] (M.D.Ala. 1999). But see *In re* Pryor, 234 B.R. 716 [135 Educ. L. Rep. 164] (Bankr. W.D. Tenn. 1999), where a bankruptcy court held that the provisions of section 523(a)(8) do not apply to a nonstudent, third party co-signor of a student loan.

The federal bankruptcy court in Maine rejected a student's charge that the lender of his defaulted loan did not exercise due diligence in its collection efforts before tendering the claim to the United States for payment.[28] The court contended that the due diligence provisions are in place solely to govern the relationship between the insured lenders and the United States.

Undue Hardship

Section 523(a)(8) of the Bankruptcy Code provides that a debtor is not discharged from a student loan unless "[i]t will impose an undue hardship on the debtor and the debtor's dependents." Although the Bankruptcy Code does not define "undue hardship,"[29] courts agree that "mere financial adversity is insufficient,"[30] and that a spouse's income may be utilized in evaluating hardship.[31] Numerous judicial tests are employed in examining undue hardship.[32] Some courts apply the "totality of the circumstances" test enunciated in *In re Andrews,*[33] which reviews a debtor's past, present, and reasonably reliable future financial resources; the calculation of a debtor's and his/her dependents' reasonable and necessary living expenses; and any other relevant facts and circumstances. Other courts have adopted the three-part *Brunner*[34] test, which deals with a debtor's inability to maintain a minimal standard of living; to retain his or her current financial status for a significant portion of the repayment period; and to make a good faith effort to repay the loans. The debtor has the burden to establish each element of the test.[35]

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[28] United States v. Dwelley, 59 F. Supp.2d 115 [138 Educ. L. Rep. 277] (D. Me. 1999).

[29] *In re* Thomsen, 234 B.R. 506 [135 Educ. L. Rep. 154] (Bankr. D. Mont. 1999).

[30] *In re* Brown, 18 B.R. 219 [3 Educ. L. Rep. 98] (Bankr. Kan. 1982).

[31] *In re* Elmore, 230 B.R. 22 [132 Educ. L. Rep. 482] (Bankr. D. Conn. 1999).

[32] The court in *In re* Powers stated in a footnote, "[i]t has been said that there are as many factors and tests which have been used to determine undue hardship as there are courts to decide the issue." Citing *In re* Johnson, 121 B.R. 91, 93 (Bankr. N.D. Okla. 1990).

[33] *In re Andrews*, 661 F.2d 702 (8th Cir. 1981). *See In re* Perry, 239 B.R. 801 [138 Educ. L. Rep. 822] (Bankr. W.D. Ark. 1999), *In re* Clark, 240 B.R. 758 [139 Educ. L. Rep. 528].(Bankr. W.D. Mo. 1999), *In re* Williams, 233 B.R. 423 [134 Educ. L. Rep. 512] (Bankr. W.D. Mo. 1999), and *In re* Brown, 234 B.R. 104 [134 Educ. L. Rep. 960] (Bankr. W.D. Mo. 1999).

[34] Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 [42 Educ. L. Rep. 535] (2nd Cir. 1987).

[35] *In re* Vinci, 232 B.R. 644, 651 [134 Educ. L. Rep. 195] (Bankr. E.D. Pa. 1999).

Two cases focused on the second prong of the *Brunner* test and a debtor's ability to sustain current financial status. A bankruptcy court in Missouri utilized both the *Brunner* and *Andrews* tests in rejecting a Chapter 7 debtor's claim that future expenses of raising a family would create an undue hardship, even though he had the present ability to pay.[36] In addition, a bankruptcy court in Alabama refused to vacate its order not to discharge a student loan debt unless he could have shown manifest error or newly discovered evidence, even though the debtor's financial situation changed significantly after the evidentiary hearing.[37]

Six cases on undue hardship focused on whether a Chapter 13 confirmation plan for repayment that included a claim of undue hardship could supplant the adversary proceeding necessary to evaluate a debt's dischargeability. Unwary student loan creditors who failed to make timely objections to plans were faced with issues of *res judicata* when they attempted to collect the balances of the debt. Five bankruptcy courts refused to confirm plans purporting to discharge student loans for undue hardship without adversary proceedings.[38] The courts stated that to forego the adversary proceeding would have allowed the discharges of debts without satisfying necessary procedural safeguards and would have allowed debtors only to provide a conclusory allegation of hardship.[39] However, when a student loan creditor from Kansas failed to make timely objections during the adversary proceeding, the Tenth Circuit remarked that even though a debtor has the burden of proving undue hardship, a student loan creditor has a duty to ensure that its interests are adequately protected. The court wrote that "[a] creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests."[40]

Courts also dealt with the dischargeability of collection fees and interest owed by debtors. A bankruptcy court in Ohio denied a student debtor's claim that "collection costs" fall within the dischargeability of a student loan.[41] The court mandated that assessing collection costs to the debtor was a statutory mandate and separate from a default penalty. Similarly, bankruptcy[42] and federal trial courts[43] in Alabama faced the issue of whether interest costs on the unpaid amounts of loans were dischargeable where the amounts accrued after petitions for bankruptcy were filed. Both courts discerned that post-petition interest was not dischargeable, and the debtors were responsible for interest that accrued during the pendency of the discharge hearings. The federal trial court went on to hold that post-petition interest was due on any part of the loan that was not dischargeable, even though the debtor paid the allowed claims and received a bankruptcy discharge.

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[36] *In re* Chapman, 238 B.R. 450 [137 Educ. L. Rep. 724] (Bankr. W.D. Mo. 1999).

[37] *In re* White, 243 B.R. 515 [140 Educ. L. Rep. 960] (Bankr. N.D. Ala. 1999).

[38] *In re* Evans, 235 B.R. 133 [135 Educ. L. Rep. 166] (Bankr. S.D. Fla. 1999); *In re* Hinton, 231 B.R. 384, [133 Educ. L. Rep. 511] (Bankr. S.D. Fla. 1999); *In re* Stevens, 236 B.R. 350 [136 Educ. L. Rep. 432] (Bankr. E.D. Va. 1999); *In re* Bell, 236 B.R. 426 [136 Educ. L. Rep. 435] (N.D. Ala. 1999); *In re* Galey, 230 B.R. 898 [133 Educ. L. Rep. 130] (Bankr. S.D. Ga. 1999).

[39] *In re* Evans, *id.* at 135-36 [citing *In re* Mammel, 221 B.R. 238 (Bankr. N.D. Iowa 1998)].

[40] *In re* Andersen, 179 F.3d 1253, 1257 [136 Educ. L. Rep. 135] (10th Cir. 1999).

The last issue concerning undue hardship addressed restructuring repayment of the student loan. A federal bankruptcy court in Wisconsin rejected a creditor's claim to restructure a student debtor's repayment plan or defer the determination of undue hardship. The court noted that federal bankruptcy law "[p]rovides no alternative--either a debt is dischargeable as an undue hardship or it is not."[44] Yet, in 1998, the Sixth Circuit ruled that bankruptcy courts have the power to grant student loan debtors relief short of total discharge.[45] On remand, a bankruptcy court in Tennessee refused to discharge any portion of the debtor's student loan but did provide for a graduated payment schedule.[46] In 1999, a bankruptcy court in Ohio reduced a debtor's payments by fifty percent and suspended interest accrual for one year,[47] while a bankruptcy court in Missouri granted a discharge on some of a student debtor's loans where the debtor could pay some, but not all, of the outstanding loans.[48]

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[41] *In re* Featherston, 238 B.R. 377 [137 Educ. L. Rep. 719] (Bankr. S.D. Ohio 1999).

[42] *In re* Girard, 243 B.R. 894 [141 Educ. L. Rep. 167] (Bankr. M.D. Ala. 1999).

[43] *In re* Bell, 236 B.R. 426 [136 Educ. L. Rep. 435] (N.D. Ala. 1990).

[44] *In re* Salinas, 240 B.R. 305, 316 [138 Educ. L. Rep. 834] (Bankr. W.D. Wis. 1999).

[45] *In re* Hornsby, 144 F.3d 433 [126 Educ. L. Rep. 643] (6th Cir. 1998).

[46] *In re* Hornsby, 242 B.R. 647 [140 Educ. L. Rep. 953] (Bankr. W.D. Tenn. 1999).

[47] *In re* Young, 237 B.R. 139 [136 Educ. L. Rep. 906] (Bankr. N.D. Ohio 1999).

[48] *In re* Williams, 233 B.R. 423 [134 Educ. L. Rep. 512] (Bankr. W.D. Mo. 1999).

Sovereign Immunity

Sovereign immunity under the Eleventh Amendment[49] was an important issue in student bankruptcy cases. The Eleventh Amendment has been interpreted as prohibiting suits in federal court where private citizens sue the state or state officials unless the state expressly consents to such litigation.[50] A federal bankruptcy court in Missouri asserted that since a suit against a state official over dischargeability of a debt owed to the state was, in actuality, against the state, it was barred by the Eleventh Amendment.[51] Consequently, the debtors could not resort to the federal bankruptcy courts to obtain a determination of the dischargeability of their student loan debts where the defendant was a state actor.

The federal bankruptcy court in Montana[52] undertook a five-part test to consider when a private entity may be classified as an arm of the state[53] and benefit from Eleventh Amendment immunity. The court found that while the guaranty agency was not entitled to immunity because it did not address any of the factors for immunity, it could raise the same claim again on appeal.

After considering whether a party was an arm of the state, three courts reviewed how a state may waive its Eleventh Amendment immunity and consent to a suit. In a federal bankruptcy court in Michigan, Chapter 7 debtors filed suit to discharge their student loans.[54] The court pointed out that since the nonprofit corporation that administered the student loan was a "state entity," it was entitled to sovereign immunity. When the court ascertained that it lacked subject matter jurisdiction, it dismissed the case pending refiling in the state court of claims. However, the Eight Circuit decided that a state loan program in Missouri did waive Eleventh Amendment immunity when it filed a proof of claim in a bankruptcy proceeding. The court maintained that since the bankruptcy and adversary proceedings for dischargeability were intertwined, "a waiver in one aspect applies to the others as well."[55] Finally, the Tenth Circuit weighed in on this issue when it posited that Kansas State University waived its immunity by entering into a contractual agreement when a student defaulted on a loan.[56] The court observed that it would have defied logic to conclude that the University intended anything other than a waiver.

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[49] According to the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[50] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[51] *In re* Stout, 231 B.R. 313 [133 Educ. L. Rep. 506] (Bankr. W.D. Mo. 1999).

[52] *In re* Muir, 239 B.R. 213 [137 Educ. L. Rep. 1001] (Bankr. D. Mont. 1999).

[53] The arm of the state test includes five factors: whether a money judgment would be satisfied out of state funds; whether an entity performs central governmental functions; whether an entity may sue or be used; whether an entity has power to take property in its own name or only the name of the state; and an entity's corporate status. *Id.* at 217.

[54] *In re* Scarborough, 229 B.R. 145 [132 Educ. L. Rep. 141] (Bankr. W.D. Mich. 1999).

Statute of Limitation

The Supreme Court of Iowa affirmed that a state statute, which directed that no lapse of time could bar an action to recover on a loan made on behalf of any institution, was neither ambiguous nor limited as to either the types of loans to which it applied or to the particular institution making the loan.[57] In Texas, the federal government brought an action against a student in default on a student loan. The student unsuccessfully raised defenses regarding statute of limitations, laches, and failure of consideration. A federal trial court rejected each of the defenses on the basis that they did not apply in student loan cases.[58]

Federal Debt Collection and Practices Act

A Chapter 13 debtor who could not discharge her student loans filed a complaint against a guaranty agency alleging that it violated the Federal Debt Collection and Practices Act (FDCPA) when it attempted to collect on her student loans. The federal trial court in Minnesota declared that since the guaranty agency was acting incidental to a fiduciary obligation to the government, it was not subject to the FDCPA.[59] The federal trial court in Massachusetts reached a similar result when it indicated that the FDCPA was not implicated where a collection agency was not a debt collector since the debt was not in default.[60]

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[55] *In re* Rose, 187 F.3d 926, 929-30 [137 Educ. L. Rep. 885] (8th Cir. 1999).

[56] *In re* Innes, 184 F.3d 1275 [137 Educ. L. Rep. 185] (10th Cir. 1999).

[57] Univ. of Iowa v. Dunbar, 590 N.W.2d 510 [133 Educ. L. Rep. 579] (Iowa 1999).

[58] United States v. Durbin, 64 F. Supp.2d 635 [139 Educ. L. Rep. 256] (S.D. Tex. 1999).

[59] Montgomery v. Educational Credit Management Corp., 238 B.R. 806 [137 Educ. L. Rep. 736] (D. Minn. 1999).

[60] Skerry v. Mass. Higher Educ. Assistance Corp., 73 F. Supp.2d 47 [140 Educ. L. Rep. 544] (D. Mass. 1999).

First Amendment

State Action

Before adjudicating a claim of constitutional deprivation by a private university, a plaintiff must show there was state action. In separate cases, two federal trial courts decreed that private universities were not state actors subject to constitutional restrictions.[61] Both courts utilized similar tests/factors in evaluating whether the universities assumed a traditionally public function, whether there was a sufficient symbiotic relationship between them and the state such that they could be viewed as joint participants, whether there was a sufficient nexus between the state and the universities that compelled the latter to act, and the *Lebron* test.[62] The court in the District of Columbia went so far as to point out that the receipt of public monies was not enough to make a private university a state actor since the government had to exert control over the institution.[63]

Freedom of Speech

The First Circuit reviewed the First Amendment speech rights of an education major in Massachusetts who was discharged from his student teaching assignment after defying a principal's request to cease expressing his personal views to employees and students. The court rejected the student's argument to consider his speech rights as those of a college student rather than as an employee of the school district.[64] Applying *Connick v. Myers*,[65] the court believed that only one of the student teacher's views, on abortion, was a matter of public concern. Even so, the court judged that the school's interest in a collegial atmosphere, respect for the curriculum, and not tolerating insubordination outweighed the student's interest in speaking for his chosen causes.

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[61] Remy v. Howard Univ., 55 F. Supp.2d 27 [137 Educ. L. Rep. 523] (D.C. 1999); Missert v. Trustees of Boston Univ., 73 F. Supp.2d 68 [140 Educ. L. Rep. 554] (D. Mass. 1999).

[62] Lebron v. Nat'l Railroad Passenger Corp., 513 U.S. 374 (1995). This three-part test consists of government creation of the corporation by special law, furtherance of a government objective, and government retention of permanent authority to appoint the majority of the corporation's directors.

[63] Remy, *supra* note 61 at 28-29.

[64] Hennessy v. City of Melrose, 194 F.3d 237 [139 Educ. L. Rep. 124] (1st Cir. 1999).

[65] Connick v. Myers, 461 U.S. 138 (1983).

The Sixth Circuit rejected the First Amendment claim of a student journalist in Kentucky that it was illegal for a university to refuse to distribute the annual yearbook [66] The court relied on *Hazelwood v. Kuhlmeier,*[67] which dealt with editorial control of a school-sponsored student newspaper. Citing the Student Publications Board's regulations regarding oversight of the yearbook, the court acknowledged that the student could not prove that the university relinquished editorial control or intended the yearbook as a public forum. Given some of the alleged problems with the yearbook, the court was satisfied that it was reasonable for the university to "cut its losses" by refusing to distribute the yearbooks.

Students at a community college in California sought to enjoin a campus policy regulating speech and advocacy on campus by students and the general public. The policy required students to get approval for certain speech, designated speech to preferred areas, and distinguished between commercial and noncommercial speech. A federal trial court granted the students' request for a preliminary injunction since the policy contained content-based restrictions in the form of a preference for noncommercial speech, did not satisfy the strict scrutiny insofar as it was insufficiently narrowly tailored to a compelling state interest, and constituted prior restraint.[68]

Freedom of Association

Members of a fraternity unsuccessfully claimed a First Amendment right to free association and a Fourteenth Amendment right to equal protection when their organization lost its university recognition after drugs were discovered in their fraternity house. A federal trial court in Pennsylvania granted the university's motion for summary judgment, explaining that the fraternity was not covered by free association protections accorded to either intimate or expressive associations because the primary function of a fraternity is social.[69] The court added that the university's withdrawal of the fraternity's recognition was lawful since it had an interest in preserving a safe educational environment and because there was no major effect on the fraternity's efforts to otherwise associate with its membership outside university activities. The court rejected the equal protection argument, applying a rational basis analysis since the fraternity did not belong to a suspect classification.

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[66] Kincaid v. Gibson, 191 F.3d 719 [138 Educ. L. Rep. 642] (6th Cir. 1999), *reh'g en banc granted* and opinion vacated, 197 F.3d 828 [140 Educ. L. Rep. 464] (1999).

[67] Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260 [43 Educ. L. Rep. 515] (1988).

[68] Burbridge v. Sampson, 74 F. Supp.2d 940 [140 Educ. L. Rep. 606] (C.D. Cal. 1999).

[69] Pi Lambda Phi Fraternity v. University of Pittsburgh, 58 F. Supp.2d 619 [138 Educ. L. Rep. 216] (W.D. Pa. 1999).

Freedom of Religion

Both of this year's religion cases took place in New York. A federal trial court granted a preliminary injunction that allowed a church-affiliated group to continue to conduct Bible study meetings on campus.[70] Yet, in the same suit, a student who was a member of a Bible study group unsuccessfully sought reinstatement after being suspended for harassing and intimidating others who did not follow her beliefs. The court was convinced that the university had valid reasons, other than religion, to support its discipline against the student. At the same time, the court reasoned that the university was likely to be liable for banning the church group from renting a facility that it previously had used.

In the second case, a federal trial court considered whether the content of a community college course in human sexuality violated the Establishment Clause.[71] Students complained that the curriculum advocated an anti-religious message and attempted to manipulate their beliefs. After considering the standing of the parties, the court applied both the *Lemon* test[72] and endorsement of religion test in granting the college's motion for summary judgment. The court contended that the college did not violate the Establishment Clause just because governmental action did not coincide with the students' religious tenants. Moreover, the court commented that thousands of college courses would have been invalidated if it were unconstitutional to read books that question students' religious faith. The court offered that a judgment in favor of the students would have violated the Establishment Clause since a religious group would have been able to dictate the course curriculum.

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[70] Lark v. Lacy, 43 F. Supp.2d 449, [134 Educ. L. Rep. 906] (S.D.N.Y. 1999), *vacated in part*, 87 F. Supp.2d 251 (2000).

[71] Gheta v. Nassau County Community College, 33 F. Supp.2d 179 [132 Educ. L. Rep. 395] (E.D.N.Y. 1999).

[72] Lemon v. Kurtzman, 403 U.S. 602 (1971). The three-part test requires a challenged government practice to have a secular purpose, a principle or primary effect that neither advances nor inhibits religion, and not foster excessive states entanglement with religion. 403 U.S. at 612-13.

Discipline

In *Board of Curators of the Univ. of Missouri v. Horowitz,*[73] the Supreme Court distinguished between academic and nonacademic student discipline. Specifically, the Court enunciated that nonacademic dismissals require notice of the charges and an informal give-and-take between the parties that affords students the opportunity to explain their conduct. On the other hand, since academic dismissals require less procedural protection, the courts usually show deference to decisions of educational institutions.

Nonacademic Disciplinary Action

When a nonacademic infraction prohibited two university seniors from graduating, the issue was whether an individual must be in good standing to graduate. The students claimed they met all the conditions for commencement before the disciplinary procedures were completed and that the punishment was disproportionate to their offenses. A federal trial court in Massachusetts disagreed with the students in using a contractual theory to review the expectations of the parties.[74] As such, the court reasoned that the students were still students subject to the disciplinary procedure while awaiting the award of the degree.

A student who was dismissed filed a procedural due process violation under section 1983 when a university president increased the sanction recommended by a student judicial body. A federal trial court in Virginia rejected the student's claim that due process required the president to agree with the panel that heard the evidence on the basis that otherwise, every appeal would be meaningless.[75] The court remarked that the student was not entitled to a separate hearing before the president since the legal standard was whether the initial hearing before the student body was meaningful. The court also pointed out the irony that occurred when the student erroneously assumed the president would decrease the penalty when the student asked the president to modify the sanction.

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[73] 435 U.S. 78 (1978).

[74] Dinu v. Pres. and Fellows of Harvard College, 56 F. Supp.2d 129 [137 Educ. L. Rep. 619] (D. Mass. 1999).

[75] Smith v. Rector and Visitors of the Univ. of Va., 78 F. Supp.2d 533 [141 Educ. L. Rep. 520] (W.D. Va. 1999).

In Massachusetts, an appellate court was of the view that a student who was sanctioned for sexual misconduct had a common law right of action against his university to ensure that he was subject to a fair disciplinary process.[76] Avoiding the issue of a contractual relationship, the court discerned that the student's common law rights derived from his right of association with the university. The court stated that the level of the hearing may reflect the severity of the accusations, and that the university had to substantially, but not rigidly, follow its own procedures. Along these same lines, a fraternity in New York alleged that the adjudicatory proceedings that a university used against it were unfair and tainted by bias. In rejecting the fraternity's claims, an appellate court wrote that its review was limited to whether the university substantially followed its own published rules. Even though the fraternity was not entitled to due process, the court ruled that the university provided notice of charges, a right to be heard, a right to legal counsel, and an opportunity to cross-examine witnesses.[77]

Academic Disciplinary Action

In *Ewing*[78] the Supreme Court clearly mandated that the judiciary should show deference to the academic decisions of educational institutions and may not override them unless they substantially deviate from accepted academic norms. This judicial standard was affirmed when an appellate court in the District of Columbia rejected a medical student's claim that he received a failing grade and was dismissed from a program because of the ill-will of an evaluating faculty member.[79] The court cited *Ewing*, restating the policy of deference in academic decisions, in finding that a rational basis existed for the dismissal. The court determined both that the evidence did not support that ill-will was the sole cause for the grade, and that even while he was on notice of his academic difficulties, the student continued to perform poorly.

Due Process

The Fifth Circuit addressed the merits of a suit filed by a doctoral student in Texas who was dismissed for poor performance wherein he alleged that a university violated his rights to equal protection and due process.[80] The court quickly dismissed the due process claims citing the deference provided to universities in *Ewing* and *Horowitz*. Utilizing rational relationship scrutiny, the court also denied the equal protection claim since the student failed to allege discrimination based on membership in a particular class.

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[76] Schaer v. Brandeis Univ., 716 N.E.2d 1055 [137 Educ. L. Rep. 1091] (Mass. App. Ct. 1999), *cert. granted,* 722 N.E.2d 977 (1999).

[77] Rensselaer Society of Engineers v. Rensselaer Polytechnic Inst., 689 N.Y.S.2d 292 [135 Educ. L. Rep. 226] (N.Y. App. Div. 1999).

[78] Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 [28 Educ. L. Rep. 720] (1985).

[79] Alden v. Georgetown Univ., 734 A.2d 1103 [137 Educ. L. Rep. 309] (D.C. 1999).

The Supreme Court of Alaska reversed and remanded a case wherein a university removed a student teacher from an undergraduate teaching program for insubordination in a local school district.[81] Unlike other states, the court asserted that in academic dismissals, a student must receive notice in such time so that he or she has a reasonable opportunity to correct the deficient performance. The court ascertained that the student was only made aware of his possible exclusion from the program on the same day that he was dismissed.

Breach of Contract

The federal trial court in Massachusetts resolved a breach of contract suit filed by an African-American student who was dismissed from a doctoral program for failing to pass a preliminary examination. The court noted the contractual relationship between the student and the university but stated that she failed to provide evidence of racial discrimination when alleging that officials allowed some students to revise their work while others had to retake the entire examination.[82] The court said that "garden variety" unfairness did not support a claim of racial discrimination.

In Arkansas, an appellate court sustained a private college's claim that it did not commit a breach of contract when it expelled a student for violating its Honor Code.[83] The student did not contest the substance of the Code or make any claim of procedural due process; she only claimed that she was innocent of any wrongdoing. The court declared that it would not interfere with disciplinary matters since there was no claim of abuse of discretion.

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[80] Wheeler v. Miller, 168 F.3d 241 [132 Educ. L. Rep. 674] (5th Cir. 1999).

[81] Nickerson v. University of Alaska Anchorage, 975 P.2d 46 [134 Educ. L. Rep. 354] (Alaska, 1999).

[82] Govan v. Trustees of Boston Univ., 66 F. Supp.2d 74 [139 Educ. L. Rep. 411] (D. Mass. 1999).

[83] Lyon College v. Gray, 999 S.W.2d 213 [137 Educ. L. Rep. 1132] (Ark. Ct. App. 1999).

Racial Discrimination

A federal trial court in New York rejected an African-American student's complaint that a course grade was calculated in a racially discriminatory manner.[84] The student claimed racial discrimination under section 1981 and title VI when she earned a poor grade in an independent study course and elected to transfer departments. The court observed that the student failed to show that the grade was arrived at with an intent to discriminate on the basis of race. The court cited *Ewing* as providing deference to the academic judgement of professors. According to the court, even if the professor had been less than an ideal instructor, such faults did not violate the student's civil rights. As to the transfer into another department, the court maintained that race-neutral reasons explained why the department may have wanted the student to transfer. Further, the court posited that the student failed to allege that the university was a recipient of federal funding, a necessary element in a title VI claim.

Federal Statutes

Title IX

Title IX of the Education Amendment of 1972 forbids schools that receive federal funding from discriminating against or denying the benefits of any educational program or activity to students on the basis of sex.[85] The Supreme Court has subsequently interpreted sexual discrimination as including of sexual harassment. There are two major types of sexual harassment: quid pro quo and hostile environment.

Sexual Misconduct:

In *Gebser v. Lago Vista Independent School District,*[86] the Supreme Court held that institutional liability for teacher-student harassment requires an official with authority to take corrective action to have actual knowledge of the harrassment yet exhibit deliberate indifference. The federal trial court in Rhode Island interpreted this standard when an international female college student alleged that a college employee sexually harassed her over the course of a school year. The court rejected the student's argument that *Gebser* only applied to hostile environment not quid pro quo sexual harassment because the Supreme Court never mentioned the distinction between these two forms of harassment in *Gebser*.[87] The court decreed that there was no evidence that a college official with authority to take corrective action had actual knowledge of harassment since the evidence at trial demonstrated nothing other than a consensual relationship.

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[84] Tripp v. Long Island Univ., 48 F. Supp.2d 220 [136 Educ. L. Rep. 242] (E.D.N.Y. 1999).

[85] 20 U.S.C. §1681.

[86] 524 U.S. 274 [125 Educ. L. Rep. 1055] (1998).

When a female college student in Rhode Island accused a chemistry professor of sexual harassment because he inappropriately touched her during his office hours, others joined in claiming that he engaged in prior and continued acts of sexual harassment. The student filed suit against the university including a title IX claim of quid pro quo and hostile environment sexual harassment, charging that officials were aware of the professor's conduct but failed to protect other students. On the hostile environment claim, the First Circuit believed that testimony over the professor's continued acts of sexual misconduct was inadmissible because of the length of time that passed and since it could have been prejudicial to the university in showing its attitude at the time that the incident at issue occurred.[88] Further, the court indicated that the quid pro quo argument was not persuasive because insofar as the student was not enrolled in the professor's class, he had no direct authority over her grade and never conditioned any services in exchange for sexual favors.

Former members of a women' tennis team at a private university in New York alleged that their coach sexually harassed them over a three year period. The victims lodged a formal complaint but argued there was only a sham investigation to conceal the coach's misconduct over the past twenty years. A federal trial court was satisfied that students presented a claim that was sufficient to sustain a cause of action under title IX.[89]

A female student sued a public university in Virginia under title IX for alleged acts of sexual discrimination. The university challenged the constitutionality of the federal law that abrogates a state's Eleventh Amendment immunity regarding violations of title IX. In addition, the student claimed that the university voluntarily waived its Eleventh Amendment immunity as a condition to receive federal funding under title IX. On interlocutory appeal, the Fourth Circuit court concluded that Congress could utilize its spending power to condition the receipt of title IX funds on a waiver of an institution's Eleventh Amendment immunity.[90]

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[87] Liu v. Striuli, 36 F. Supp.2d 452 [133 Educ. L. Rep. 431] (D.R.I. 1999).

[88] Wills v. Brown Univ., 184 F.3d 20 [137 Educ. L. Rep. 93] (1st Cir. 1999).

[89] Ericson v. Syracuse Univ., 35 F. Supp.2d 326 [133 Educ. L. Rep. 70] (S.D.N.Y. 1999).

Athletic Opportunities

A typical title IX claim for failure to provide athletic opportunities on the basis of sex falls under either inadequate accommodation[91] or unequal treatment.[92] In a case against a private university in New York, female lacrosse and softball athletes sought to file a class action suit alleging discrimination in accommodation and unequal treatment, namely unequal benefits and unequal scholarship funding, in their sports.[93] The Second Circuit acknowledged that the lacrosse team's allegation was moot since a varsity team had been created and that it was too late to add a damage claim to avoid the mootness argument. As to the softball athletes, the court remanded the dispute pending the university's promise to establish a varsity team. The panel also reversed the trial court's class certification of club athletes since these issues were never presented.

In North Carolina, a female athlete brought a title IX suit against a university and its football coach for refusing to allow her to be a member of the men's football team.[94] At issue was the provision in title IX over the exclusion of members of the opposite sex in contact sports.[95] The Fourth Circuit judged that institutions must only allow members of an excluded sex to try out for single-sex teams of non-contact sports. Further, the court was convinced that while nothing prohibits a university from allowing an excluded sex to participate in a contact sport, once this occurs, it cannot discriminate against athletes on the basis of sex.

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[90] Litman v. George Mason Univ., 186 F.3d 544 [137 Educ. L. Rep. 448] (4th Cir. 1999), *cert. denied,* 120 S. Ct. 1220 (2000).

[91] 34 C.F.R. § 106.41(c)(1). Accommodation refers to the type of teams field ["teams field" unclear]by each sex and the accompanying opportunities for participation created by the number of teams.

[92] 34 C.F.R. § 106.37(c) and 106.41(c)(2)-(10). Unequal treatment refers to inequality based upon athletic scholarships and other athletic benefits and opportunities among the sexes.

[93] Boucher v. Syracuse Univ., 164 F.3d 113 [131 Educ. L. Rep. 635](2nd Cir. 1999). The plaintiffs claimed that women only comprised 32.4% of its athletes but made up over 50% of the student body and that no new female athletic teams were added between 1981-97. *Id.* at 115-16.

[94] Mercer v. Duke Univ., 190 F.3d 643 [138 Educ. L. Rep. 113] (4th Cir. 1999).

[95] 34 C.F.R. § 106.41(b) states, in part, that "[m]embers of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport."

On the opposite side of title IX, male athletes have complained about the loss of programs as universities seek to attain gender equity. For instance, the Seventh Circuit ruled in favor of a university in Illinois where male students alleged that the elimination of the their intercollegiate soccer and wrestling programs violated federal constitutional and statutory provisions, including title IX.[96] The court was of the opinion that it was impossible to argue that the elimination of a sports team was solely motivated by financial or sex-based motives, that the reduction in men's sports was legal as long their participation was in substantial proportion to their enrollment, and that title IX superceded claims under section 1983.

In a similar vein, the Ninth Circuit addressed whether a university could make across-the-board reductions in the number of available men's roster spots to achieve gender equity. An appellate court contended that title IX regulations were constitutional because athletic opportunities had to be made available that were representative of student composition, not the level of interest expressed in athletic participation. [97]

A female athlete unsuccessfully relied on title IX in challenging the NCAA's restrictions on graduate athletic eligibility. In *N.C.A.A. v. Smith*, the Supreme Court reasoned that the NCAA was a private organization that did not receive federal funding.[98] The Court thus rejected the student's argument that receipt of dues from recipients of federal funds was sufficient to subject the NCAA to suit under title IX.

Title VII

Title VII litigation is premised on discrimination in the workplace based on national origin, race, sex, color, and religion.[99] Title VII was at issue before the federal trial court in Kansas where a graduate research assistant claimed national origin and gender discrimination along with retaliation when she complained of inequitable treatment. Even though the court discerned that the student was an employee for purposes of title VII, it granted the university's motion for summary judgment.[100] The court wrote that there was neither evidence of intentional discrimination nor was there a nexus between the discriminatory statements and the university's actions. The court added that the student failed to provide evidence of retaliation for any protected activity under title VII or that comments made about her national origin were pervasive enough to constitute a hostile work environment.

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[96] Boulahanis v. Board of Regents, 198 F.3d 633 [140 Educ. L. Rep. 509] (7th Cir. 1999).

[97] Neal v. Board of Trustees of the Cal. State Univ., 198 F.3d 763 [140 Educ. L. Rep. 533] (9th Cir. 1999).

[98] 525 U.S. 459 [132 Educ. L. Rep. 33] (1999).

[99] 42 U.S.C. §2000e-2.

[100] Mohankumar v. Kansas St. Univ., 60 F. Supp.2d. 1153 [138 Educ. L. Rep. 416] (D. Kan. 1999).

Section 1983

A section 1983 action must occur under the "color of state law" and result in a deprivation of a constitutional or statutory right.[101] In a case from Oregon, a non-student brought a section 1983 action after being banned from the campus of a public university.[102] The Ninth Circuit remarked that the plaintiff did not establish a constitutionally-protected interest in having access to the university and that it did not have to allow all members of the public onto its premises, regardless of their conduct.

A federal trial court in New York clarified when section 1983 liability may lie against municipal supervisory employees. An African-American student claimed racial discrimination when he was academically dismissed from a university's social work program and later arrested by city police for trespassing at the university.[103] The court granted the defendants' motion to dismiss in stating that a section 1983 action does not exist against a municipality unless responsible supervisory officials acquiesce in a pattern of unconstitutional conduct by subordinates. The court also decided that section 1983 cannot be predicated upon respondeat superior or vicarious liability.

Disability Law

In part, the Americans with Disabilities Act (ADA) provides that "no qualified individual shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[104]

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[101] Parratt v. Taylor, 451 U.S. 527 (1981).

[102] Souders v. Lucero, 196 F.3d 1040 [139 Educ. L. Rep. 878] (9th Cir. 1999), *cert denied*, 2000 WL 156927.

[103] Dove v. Fordham Univ., 56 F. Supp.2d 330 [137 Educ. L. Rep. 646] (S.D.N.Y. 1999).

[104] 42 U.S.C. §§12101, 12132.

In ADA discrimination litigation in higher education,[105] a student must first show that a "disability"[106] exists. Once a court determines that a disability exists, a student must show that he or she is "otherwise qualified" to be admitted or to remain at a university. This step is most often litigated because of the alleged failure of educational institutions to make "reasonable accommodations" to the known physical or mental impairments of students.[107] Moreover, the discrimination must be based solely on the result of the disability.[108]

All five of the federal cases addressing whether a disability was covered by the ADA involved medical, nursing, or dental students. A federal trial court in Michigan examined what constitutes a disability when a medical student sought injunctive relief against the National Board of Medical Examiners for its refusal to make a reasonable accommodation for his needs during a series of standardized medical school tests. In reviewing the legislative intent of the ADA, the court denied the injunction because the student's learning and reading disability was not substantially limiting when measured against the average person in the general public.[109]In Massachusetts, the federal trial court found that a student who was dismissed for poor academic performance was not disabled under the ADA due to poor eyesight.[110] Applying two recent Supreme Court cases on the issue of disability correction,[111] the court offered that the student did not have a disability after being provided with visual corrections since his physical condition did not limit either a major life's activity or his ability to learn.

The Fourth Circuit ascertained that a medical student in Virginia was otherwise qualified after he was denied admission because he failed to meet academic requirements.[112] The court remanded in holding that the school failed to consider the effect that reasonable accommodations may have had on the student's ability to meet all of the program's admission requirements. The court also considered a Supreme Court case that explained that a request for accommodation must be reasonable and not fundamentally alter a curricular program or its standards.[113]

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[105] Most courts have not found a significant difference in their analyses of the rights created by the ADA and Section 504 of the Rehabilitation Act, 29 U.S.C.§ 794, et. seq. *See* Doe v. University of Md. Med. Sys.Corp., 50 F.3d 1261, 1265 (4th Cir. 1995).

[106] 42 U.S.C. §12102(2)(A-C) defines "disability" as "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual," has a record of such an impairment, or that he is regarded as having such an impairment.[doesn't follow]

[107] 42 U.S.C. §12112(b)(5)(A).

[108] Fritz v. Mascotech Automotive Sys. Group, Inc., 914 F. Supp. 1981 (E.D. Mich. 1996).

[109] Gonzalez v. National Bd. of Med. Examiners, 60 F. Supp.2d 703 [138 Educ. L. Rep. 403] (E.D.Mich. 1999).

[110] Pacella v. Tufts Univ. Sch. of Med., 66 F. Supp.2d 234 [139 Educ. L. Rep.425] (D. Mass. 1999).

[111] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

[112] Betts v. Rector and Visitors of the Univ. of Va., 191 F.3d 447 [139 Educ. L. Rep. 795] (4th Cir. 1999) (unpublished decision).

Two more cases from California that reached the Ninth Circuit helped to clarify the meaning of reasonable accommodation. First, the court asserted that a disabled student has the ultimate legal burden of proving that he or she is otherwise qualified. The court pointed out that reasonableness is not a constant insofar as what is reasonable in one situation may not be so in another. The most difficult issue concerned how much deference a court should show to an educational institution's decision concerning the reasonableness of a student's request for an accommodation. In the first case, the Ninth Circuit extended judicial deference to an institution's evaluation made absent proof that its standards served no purpose other than to deny an education to a person with a disability.[114] Subsequently, the court clarified that deference is not absolute and that before it can be accorded, an educational institution must conduct an inquiry over whether an accommodation is feasible or would not be effective.[115]

Regarding the last prong of ADA analysis, disability as the basis for an adverse action, a medical student in Missouri sued a university and professors for discrimination and retaliation under Section 504 of the Rehabilitation Act of 1973 and the ADA when he received a failing grade after taking a leave to be treated for a physiological disorder. The Eighth Circuit noted that even though the student had a disability, there was no evidence that it was the motivating factor behind the grade.[116] However, the court did agree with the student's claim that the professor may have retaliated against him for filing a grievance and pursuing legal claims of discrimination.

A federal trial court in New York addressed personal employee liability for alleged violations of the ADA and Section 504. The court rejected the notion of individual employee liability because it was reluctant to impose liability on individual employees who are not policy makers under the ADA.[117]

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[113] Alexander v. Choate, 469 U.S. 287 (1985).

[114] Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 [132 Educ. L. Rep. 81] (9thCir. 1999).

[115] Wong v. Regents of the Univ. of Cal., 192 F.3d 807 [138 Educ. L. Rep. 698] (9thCir. 1999).

[116] Amir v. St. Louis Univ., 184 F.3d 1017 [137 Educ. L. Rep. 164] (8th Cir. 1999), *reh'g en banc denied* (1999).

[117] Coddington v. Adelphi Univ., 45 F. Supp.2d 211 [135 Educ. L. Rep. 110] (E.D.N.Y. 1999).

The court maintained that when a plaintiff seeks relief based on discrimination allegedly practiced by an educational institution, it is the proper defendant since it has the power to make any accommodation required by law.

Torts

University Duty

State courts resolved numerous cases that were brought by or on behalf of injured students who alleged that a university owed them a duty because of the existence of a special relationship. When four football players in Texas were hurt in an off-campus altercation, an appellate court rejected their claim that the university had a duty to supervise them or owed an injured student a safe environment at an off-campus event that it had not sponsored.[118] The federal trial court in Utah reached the same result where a student was killed after falling from a mountain during a freshman orientation.[119] The court rejected the claim of a special relationship between the student and university since it was not satisfied that it was in a custodial relationship.

The Supreme Court of Indiana reviewed two similar cases on the same day wherein students were sexually assaulted in declaring that landowners owe students a duty of reasonable care to protect their invitees from foreseeable criminal acts.[120] The court adopted the "totality of the circumstances" test which considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable. The court stressed that this duty does not include an obligation to ensure the invitee's safety.

The Supreme Court of Nebraska, concurring with the totality of circumstances test, was of the view ruled that a university owed a fraternity student a duty for injuries that he suffered in an on-campus fraternity hazing event.[121] The court commented that the university, as landowner, had a duty to protect the student against the harmful acts of third parties, even if he had knowledge of the danger.

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[118] Boyd v. Texas Christian Univ., 8 S.W.3d 758 [141 Educ. L. Rep. 374] (Tex. Ct. App. 1999), *reh'g denied* (1999).

[119] Apffel v. Huddleston, 50 F. Supp.2d 1129 [136 Educ. L. Rep. 398] (D. Utah 1999).

[120] Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968 [135 Educ. L. Rep. 1043] (Ind. 1999) and L.W. v. Western Golf Ass'n., 712 N.E.2d 983 [136 Educ. L. Rep. 538] (Ind. 1999).

[121] Knoll v. Board of Regents of Univ. of Neb., 601 N.W.2d 757 [138 Educ. L. Rep. 1138] (Neb. 1999).

In the third case dealing with liability for criminal acts, a court in New York utilized the legal standard of prior notice of misconduct instead of the totality of circumstances test. A student who was injured during a fight between residents and nonresidents in his residence hall claimed that the university, as a landlord, owed him a duty of protection against criminal acts of third parties and to secure all outside entrances so that nonresidents could not enter. The court rejected the student's claim on the ground that the college did not owe him a duty absent evidence of prior notice of prior criminal activity in the residence hall.[122]

The final line of cases concerned a university's duty to protect students from open and obvious danger. An appellate court in Ohio observed that a state university met its duty of reasonable care from unreasonable risks when a choral student was injured upon falling into an orchestra pit after a performance.[123] The court decreed that the danger was open and obvious, and that the student was comparatively negligent. An appellate court in Louisiana came to the same conclusion when it rejected claims of wrongful death against a university where an intoxicated college student was fatally injured after falling off of the sloped roof of a university building.[124] According to the court, climbing the roof was no excuse to misuse property, especially when an obvious danger existed. The court posited that the university did not have a special duty to protect the student from misjudgments or pranks.

Causation

In Louisiana, a student who was injured after falling over the balcony of his residence hall unsuccessfully claimed that a slippery walk caused him to fall. An appellate court rejected the student's claim that the university had a duty to maintain the roof properly and repair it to stop leaks onto the balcony.[125] The court indicated that a defect in the roof was insufficient to establish liability and that other factors contributed to or caused the accident.

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[122] Weitz v. New York, 696 N.Y.S.2d 656 [138 Educ. L. Rep. 891] (N.Y. Ct. Cl. 1999)

[123] Shimer v. Bowling Green State Univ., 708 N.E.2d 305 [133 Educ. L. Rep. 575] (Ohio. Ct. Cl. 1999).

[124] Robertson v. State Dept. of Planning and Control, 747 So. 2d 1276 [141 Educ. L. Rep. 388] (La. Ct. App. 1999).

[125] Nichols v. Northeast Louisiana Univ., 729 So.2d 733 [134 Educ. L. Rep. 412] (La. Ct. Cl. 1999).

An appellate court in New York ruled that spilled shampoo at the top of a residence hall stairway was not the proximate cause of a student's fall.[126] The court was convinced that the evidence showed that the student walked on the opposite side of the steps where the shampoo was spilled.

Alcohol

When a drunken student assaulted another student at a fraternity alcohol party, the Supreme Court of Indiana reasoned that dram shop liability accrues only if the person furnishing the alcohol had actual knowledge that he or she was giving it to an individual who was intoxicated.[127]

An intoxicated sorority student sued her university when she was injured in a fall from a fire escape as she left one of several parties where alcohol was served. Citing *Bradshaw v. Rawlings*[128] and *Beach v. University of Utah,*[129] the Supreme Court of Idaho determined that there was not a special relationship between the student and university due to her adult status.[130] Even so, the court contended that the local fraternity should not have received a grant of summary judgment dismissing the case since it may have assumed a duty to protect the student pledge because it assigned her a "guardian angel."

Parents of a deceased student sued numerous entities claiming that his death was due to excessive alcohol consumption as part of a fraternity hazing ritual.[131] Affirming a motion to dismiss, an appellate court in New York wrote that evidence supported the parents' claim that the deceased did not voluntarily consume alcohol, that additional liability could stand if he had been left unattended in an unconscious state, and that claims of criminal violations should be permitted to stand.

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[126] Munno v. New York, 698 N.Y.S.2d 107 [139 Educ. L. Rep. 1014] (N.Y. App. Div. 1999).

[127] Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968 [135 Educ. L. Rep. 1043] (Ind. 1999)

[128] Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).

[129] Beach v. University of Utah, 726 P.2d 413 [35 Educ. L. Rep. 545] (Utah, 1986).

[130] Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 [139 Educ. L. Rep. 643] (Idaho 1999).

[131] Oja v. Grand Chap. of Theta Chi Fraternity, 684 N.Y.S.2d 344 [132 Educ. L. Rep. 865] (N.Y. App. Div. 1999).

Sports Injuries

A student-athlete who was injured during a road race that was a mandatory part of the team's physical conditioning for the upcoming hockey season unsuccessfully filed suit alleging various types of negligence. The Supreme Court of North Dakota affirmed a grant of summary judgment in favor of the university and race sponsors on the ground that the athlete's negligence claims were barred because he signed a release prior to the race.[132] The court stated that the release the student signed was valid and neither against public policy nor ambiguous and that he assumed responsibility for all reasonably foreseeable injuries. The court added that the university and race sponsors were not acting in concert even though the former had representatives at the event and inquired about medical care for the injured student-athlete.

When a player on an intramural soccer team punched an opponent as the level of play turned excessively physical an appellate court in California rejected the injured player's claim of negligent supervision. The court acknowledged that the university was not responsible for the intervening criminal acts of third parties where the students were adults who voluntarily participated in the game, and there was not a close causal nexus between negligent refereeing and the injury.[133] The court further believed that the university was immune from liability under the state law on hazardous recreational immunity since the student voluntarily participated in the game.

In Pennsylvania, a college baseball player who was injured when he tripped in a divot in the outfield during a game at an opposing team's ballpark, sued the college claiming it had a duty to maintain the field in a reasonably safe condition. An appellate court affirmed a grant of summary judgement in favor of the college on the basis that the player assumed the risk of injury because he was aware of the condition of the field before the game and voluntarily took part in the game.[134]

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[132] Reed v. University of N.D. , 589 N.W.2d 880 [132 Educ. L. Rep. 928] (N.D. 1999).

[133] Ochoa v. California State Univ., Sacramento, 85 Cal. Rptr.2d 768 [134 Educ. L. Rep. 977] (Cal. Ct. App. 1999).

[134] Zachardy v. Geneva College, 733 A.2d 648 [136 Educ. L. Rep. 943] (Pa. Super. Ct. 1999).

Hazing

An appellate court in Texas struck down a statute that required students to report hazing incidents. Where students who were involved in a hazing incident were charged with both hazing and failure to report the incident, the court remarked that the statute violated the Fifth Amendment's protection against self-incrimination.[135]

In the first of two cases involving hazing of military cadets, a student in Texas sued university officials under section 1983 for physical abuse and injuries that he suffered during "hell week."[136] The court suggested that there would be liability if the officials were aware of the hazing, showed deliberate indifference to it by failing to take action, and this caused a constitutional injury. The court agreed that the leadership of the student corps did not show deliberate indifference to hazing since it acted swiftly each time the student reported acts of misconduct.

The Supreme Court of Vermont held that a university was vicariously liable for injuries caused by many acts of physical and verbal abuse by upperclassmen while indoctrinating a freshman military cadet.[137] Under the doctrine of respondeat superior, the court decided that the upperclassmen were agents of the school, were authorized by it to indoctrinate the freshmen class, and were "within the scope of employment" when the hazing events took place.

Libel

A nursing student sought damages for libel after a faculty member accused her of cheating and, in accordance with the student handbook, sent letters to school officials notifying them of the misconduct. In rejecting the student's claim, an appellate court in Missouri recognized intra-corporate immunity under which communications between employees of the same corporation in the regular course of business are not considered publications to third parties.[138] The court extended this protection to public universities since they are considered quasi-public corporations.

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[135] Texas v. Boyd, 2 S.W.3d 752 [140 Educ. L. Rep. 421] (Tex. Ct. App. 1999).

[136] Alton v. Texas A&M Univ., 168 F.3d 196 [132 Educ. L. Rep. 656] (5th Cir. 1999).

[137] Brueckner v. Norwich Univ., 730 A.2d 1086 [135 Educ. L. Rep. 198] (Vt. 1999).

[138] Dean v. Wissmann, 996 S.W.2d 631 [136 Educ. L. Rep. 1095] (Mo. Ct. App. 1999).

Sexual Orientation

Where a medical school had a housing policy that made its campus apartments only available to students, their spouses, and children, two lesbian students filed suit under state law alleging discrimination because they were not allowed to reside together. An appellate court in New York rejected the student's claim of marital discrimination because precedent did not include relationships within the scope of discrimination.[139] The court also cited case law which discerned that marital status does not prevent a landlord from distinguishing between married and unmarried couples. At the same time, the court rejected the students' disparate impact argument on the basis that there was no detrimental impact on their ability to obtain housing since they were offered separate apartments. The court was of the opinion that the students' actual complaint was with the state for failing to sanction same-sex marriages.

Educational Malpractice

Students in Pennsylvania sought certification for a class action suit against a private vocational school for defrauding them by misrepresenting the school's nature and quality. The unique aspect of this case was that the students sought federal jurisdiction under the Racketeer Influenced and Corrupt Organization Act statute.[140] Under Rule 23 of the Federal Rules of Civil Procedure, the court certified the class action under the plaintiffs' "sham theory," which argued that the school failed to meet even the most basic standards necessary to offer an educational program.[141]

In a second case from Pennsylvania, a court rejected a Ph.D. candidate's claims that a faculty committee acted in an arbitrary and capricious manner and breached a contract when she failed the final defense of her dissertation.[142] The court rejected claims dealing with the tort of educational malpractice and breach of contract since the student failed to provide contractual language that the committee violated. The court also rejected the charge that the committee engaged in arbitrary and capricious conduct by citing *Ewing*'s deference to academic standards.

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[139] Levin v. Yeshiva Univ., 691 N.Y.S.2d 280 [136 Educ. L. Rep. 517] (N.Y. App. Div. 1999).

[140] 18 U.S.C. § 1964.

[141] Cullen v. Whitman Med. Corp., 188 F.R.D. 226 [138 Educ. L. Rep. 810] (E.D. Pa. 1999).

[142] Swartley v. Hoffner, 734 A.2d 915 [137 Educ. L. Rep. 301] (Pa. Super. Ct. 1999).

An appellate court in Minnesota found that the tort of educational malpractice is against public policy.[143] In affirming the rejection of students' claims for breach of contract, fraud, and misrepresentation, the court noted that they were actually for educational malpractice. Even so, the court sustained the breach of contract, fraud, and misrepresentation claims when it agreed that an institution failed to perform specific promises that did not involve educational processes or theories. Further, the court maintained that the dispute fell within the parameters of the state's Consumer Fraud Act, which protects students from protecting fraudulent "services" when they pay tuition.

Immunity

Injured members of a community college soccer team sued the college and its employees when their van crashed en route to a match.[144] Rejecting the distinction of whether the trip was involuntary or voluntary, an appellate court in California asserted that statutory immunity applied and waived all claims for students on a "field trip or excursion."

In New York, a university student filed suit after being injured while attempting to disarm a kidnapper who entered a college classroom.[145] An appellate court affirmed that the university was entitled to immunity because the alleged lack of security and the failure to warn of criminal conduct was the result of governmental functions rather than one of its proprietary functions as a landowner.

When an injured drama student sued a university and the show's producers for injuries that he suffered during a presentation, an appellate court in Texas affirmed that the public university was entitled to immunity except for certain acts of its employees. The court agreed that the university was immune because none of the producers were employees since the faculty advisors of the drama club were volunteers and the producer was an independent contractor.[146]

In Arizona, a university unsuccessfully sought recreational immunity when a student filed suit over injuries suffered on a trampoline device during an on-campus carnival.[147] An appellate court rejected the university's claim for immunity because the student's injury was caused by a piece of equipment that was stationed temporarily on the land, not the condition of the land itself. Moreover, the court pointed out that the trampoline was an artificial recreational apparatus, not something that occurred naturally in the "true outdoors."

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[143] Alsides v. Brown Inst., Ltd., 592 N.W.2d 468 [134 Educ. L. Rep. 327] (Minn. Ct. App. 1999).

[144] Barnhart v. Cabrillo Comm. College, 90 Cal.Rptr.2d 709 [139 Educ. L. Rep. 978] (Cal. Ct. App. 1999).

[145] McEnaney v. New York, 700 N.Y.S.2d 258 [140 Educ. L. Rep. 726] (N.Y. App. Div. 1999).

[146] Texas A&M Univ. v. Bishop, 996 S.W.2d 209 [136 Educ. L. Rep. 1088] (Tex. Ct. App. 1999).

An appellate court in Minnesota ruled that a public university was entitled to immunity when one of its students was sexually assaulted while participating in a study abroad program.[148] The court was of the view that the university's decision regarding placement and transportation were discretionary functions of an academic program that were protected from liability.

Conclusion

After reviewing the many cases decided in 1999 pertaining to students in higher education, it becomes readily apparent that some things never change. A cursory reading of this chapter reveals cases on the usual topics of admission, financial aid, torts, discrimination, discipline, contract, and statutory/constitutional deprivations. Courts continued to adhere to the premise that *in loco parentis* is inapplicable in higher education and believe that it is inappropriate to safeguard students from the folly of their own misjudgments. Further, courts continue to grant deference to academic decisions while issues involving racial and gender equity continue to be litigated at historic rates.

Two areas of litigation clearly stood out this year: bankruptcy and reverse discrimination. The number of plaintiffs who sought to discharge their student loans via bankruptcy proceedings was overwhelming. In fact, it was disheartening to learn that this was by far the most frequently litigated issue. These cases originated from loans made in the early and mid-1990s, but recent changes in federal law will hopefully stem this unfortunate trend. It is also now becoming common for rejected Caucasian applicants to challenge race-based admission policies and for males to attack reductions in athletic programs as universities attempt to comply with title IX. It will be interesting to follow the trend of Caucasians and males claiming reverse discrimination and taking advantage of statutes intended to provide relief for minority populations.

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[147] Smith v. Arizona Bd. of Regents, 986 P.2d 247 [138 Educ. L. Rep. 937] (Ariz. Ct. App. 1999).

[148] Bloss v. University of Minn. Bd. of Regents, 590 N.W.2d 661 [133 Educ. L. Rep. 595] (Minn. Ct .App. 1999).

An emerging topic was the tort of educational malpractice as two reported cases were filed by students who were dissatisfied with the educational programming provided by private, vocational schools. The schools typically went out of business or the students later discovered that they were not accredited, which meant their degree or certification was basically worthless. Despite these new trends and topics, the cases resolved during 1999 made for a typical year for students in higher education.

10

FEDERAL AND STATE LEGISLATION

David L. Dagley

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Introduction

This chapter summarizes statutes passed in 1999 by the United States Congress and the legislative bodies of the fifty states that impact educational institutions at the K-12 and collegiate levels.

Federal Legislation

Numerous pieces of education-related legislation were introduced during the first session of the 106th Congress. Even so, few of these bills passed before the session finished. This section briefly describes two federal bills that were passed into law in 1999 and is followed by a listing of noteworthy bills to be addressed in the next session.

Education Flexibility Partnership Act

The earliest education bill to pass the 106th Congress was the Education Flexibility Partnership Act, which expands the number of states that may obtain a waiver of federal statutory and regulatory law.[1] Previous legislation limited the number of waivers to twelve.[2] Under the new legislation, state education agencies are given oversight authority to determine whether school and student performance have improved adequately to justify the continuation of waivers. States may not waive such federal requirements as civil rights, maintenance of effort and non-supplantation, parental participation and involvement, and equitable participation of private schools.

Department of Defense STARBASE Program

Another bill allows the Secretary of Defense to conduct a K-12 science, mathematics, and technology education improvement program known as the Department of Defense STARBASE program.[3] Under this program, twenty-five STARBASE academies may be established in the states.

Waiting for further consideration in the second session of the 106th Congress are such initiatives as the Better Nutrition of School Children Act of 1999, which prohibits donation or service of foods with minimal nutritional value;[4] an amendment to the Higher Education Act of 1965 to repeal provisions prohibiting persons convicted of drug offenses from receiving student financial assistance;[5] the Sexual Harassment Awareness Reporting and Posting Act of 1999, which requires distribution of information about sexual harassment to prospective and enrolled students;[6] and the Teacher Excellence and Classroom Help Act, which provides incentive grants to states for improvements in technology training for teachers, attracts more qualified persons to the teaching profession, and reduces emergency licensures.[7]

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[1] Pub.L. No. 106-25, 113 Stat. 41 (1999).

[2] Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125.

[3] Pub.L. No. 106-65, Div. A., Title V, § 580(a), 113 Stat. 631 (1999).

[4] S. 998.

State Legislation

This section chronicles new education laws that have been passed by the states. In order to provide a sense of the different ways legislatures are attacking similar problems, the listings are organized into topic groupings.

Accountability

The states continued to add new approaches to make schools more accountable to their publics. This section reviews various approaches to accountability adopted by states in 1999.

Four states adopted provisions related to setting standards. Arkansas required its Department of Education (DOE) to develop model learning standards for the basic core of education knowledge and skills.[8] Illinois required local school boards to establish criteria and factors that determine when an attendance center will be placed on probation and into a remediation program, as well as criteria for determining how an attendance center gets off probation.[9] Nevada established a council to set academic standards for grades K-8 in public schools.[10] California, however, delayed the requirement placed on the State Board of Education to adopt statewide performance standards in core curriculum areas until December 31, 1999.[11]

Another approach to accountability involved setting up index and data-gathering systems. California established the Public School Performance Accountability Program, which would create an Academic Performance Index (API), a baseline accountability score for each public school, and annual percentage growth targets for all schools based on their API scores.[12] Under-performing schools would be subject to immediate intervention, while achieving and improving schools would be rewarded.

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[5] H.R. 1053.
[6] H.R. 2837.
[7] S. 136.
[8] 1999 Ark. Acts 911.
[9] 1999 Ill. Legis. Serv. 91-219 (West).
[10] 1999 Nev. Stat. 621.
[11] 1999 Cal. Stat. 735.

Similar to California's approach, Colorado created an Excellent Schools Program and directed its DOE to build an index to measure school performance and distribute cash awards to deserving schools.[13] Indiana required its DOE to compile statistics regarding the ethnicity and gender of students using all information that it receives from school corporations on enrollment, numbers of suspensions, and numbers of expulsions.[14] Theoretically, schools are also more accountable when they provide information to the public. Arizona began steps to add to its school district report card by directing the Joint Legislative Budget Committee staff to analyze cost data, report average per-pupil administrative costs, and report whether each school district exceeded its predicted costs.[15]

Arkansas passed the School Performance Report Act to empower parents and guardians by giving them information to judge the quality of schools.[16] Each public school in Arkansas must publish a school performance report that includes three-year trend data on school safety and discipline; results on norm-referenced and criterion-referenced tests; attendance, promotion, graduation, drop-out, and college remediation rates; qualifications of certified staff; total per-pupil spending; local taxpayer investment in the school district; percentage of students eligible for free and reduced lunch; average salary of staff; and college admissions test results. Nebraska also established a statewide report card that will include information on student performance, teacher and student attendance, teacher qualifications, salaries, graduate training, and demographics.[17]

Student testing continued as a means of legislated accountability. California placed a duty on school districts to assess the English language development of pupils, classify their levels of English proficiency, and continue testing and tracking the development of proficiency until each child is designated as English proficient.[18] Idaho required assessment of reading skills in grades K-3 to be conducted by a person who is not the classroom teacher.[19]

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[12] 1999 Cal. Stat. 3

[13] 1999 Colo. Sess. Laws 303.

[14] 1999 Ind. Acts. 1300.

[15] 1999 Ariz. Sess. Laws, Ch. 4, sec. 16.

[16] 1999 Ark. Acts 769.

[17] 1999 Neb. Laws 144.

[18] 1999 Cal. Stat. 678.

Four states addressed high-stakes testing as a condition for graduation. California required the Superintendent of Public Instruction to develop, and the State Board of Education to approve, a high school exit examination in language arts and mathematics, matched to content standards adopted by the State Board of Education.[20] Indiana required each student in tenth grade to take a graduation examination and removed the ability of the State Board of Education to adopt rules to create waivers from the graduation examination requirement.[21] Utah added statewide criterion-referenced achievement tests to the norm-referenced tests already required under the state's accountability scheme.[22] Without a passing score on the test, students in Utah would receive a certificate of completion but no high school diploma. In contrast to the approach adopted so far by many states, Missouri prohibited the use of a single test as a condition for graduation.[23]

Teacher testing also emerged as an accountability tool. California directed the Commission on Teacher Credentialing to review its basic skills proficiency test and to evaluate its content validity, reliability, and passing scores.[24] The commission must submit a written report, including any findings or recommendations, to the Legislature, Governor, and State Board of Education. Also, California encouraged local school boards to review the performance-based teacher assessment methodology of the National Board of Professional Teaching Standards as a model for local evaluation standards and procedures.[25]

Idaho placed a duty on the State Board of Education to create a single pre-service assessment for K-8 teacher preparation programs, reflecting the best practices in reading instruction.[26] By September 2002, all teacher candidates in Idaho must pass the pre-service assessment to graduate and must receive forty-five contact hours in reading instruction to be certified.

Illinois required applicants for a certificate in transitional bilingual education to test language proficiency in English and a second language.[27]

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[19] 1999 Idaho Sess. Laws 295.
[20] 1999 Cal. Stat. 1.
[21] 1999 Ind. Acts 1050.
[22] 1999 Utah Laws 336.
[23] 1999 Mo. Legis. Serv. 168, sec. A. (Vernon).
[24] 1999 Cal. Stat. 2.
[25] 1999 Cal. Stat. 279.
[26] 1999 Idaho Sess. Laws 362.
[27] 1999 Ill. Legis. Serv. 91-370 (West).

Early intervention for primary-grade students experiencing difficulty in reading emerged as an important subject of accountability-related legislation. Connecticut directed its State Board of Education to prepare a list of elementary and middle schools in need of improvement based on student performance on state-wide mastery examinations.[28] Schools must then provide additional instruction for under-performing students pursuant to personal reading plans while principals must justify in writing the promotions from third grade to fourth grade for students who are substantially deficient in reading.

Louisiana required a summer school remediation program for pupils who do not meet the minimum achievement level necessary for promotion to the fifth or ninth grades.[29]

Missouri provided additional state school aid for students in grades K-3 who do not meet the district's objectives for reading.[30]

Failure to read can also result in failure to pass. Missouri prohibited the promotion of a public school student unless the child is reading within one grade below his or her grade level.[31]

Texas prohibited the promotion from the third to the fourth grade of any student who does not perform satisfactorily on reading assessments.[32] Similarly, pupils at the fifth and eighth grade levels may not pass to the next grade if they do not perform well enough in both reading and mathematics.

Another accountability measure was take-over, which was adopted in Michigan and Mississippi. Michigan created School Reform Boards for districts that qualify for take-over.[33] A School Reform Board is composed of six members appointed by the mayor, one elected board member, and the superintendent. The powers and duties of the elected school board are suspended until a new board is seated, and the power is given to the reform board for five years, subject to voter review to continue the reform board or elect a new school board.

Rather than create a new governing board, Mississippi passed an accountability system that allows the override of management and operations decisions of local school boards and superintendents upon request by the State Board of Education that the Governor declare a state of emergency.[34]

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[28] 1999 Conn. Legis. Serv. 288 (West).

[29] 1999 La. Sess. Law Serv. 643 (West).

[30] 1999 Mo. Legis. Serv. 168, sec. A, 1 (Vernon).

[31] 1999 Mo. Legis. Serv. 168, sec. A, 9 (Vernon).

[32] 1999 Tex. Sess. Law Serv. 396 (Vernon).

[33] 1999 Mich. Legis. Serv. 10 (West).

[34] 1999 Miss. Laws 421.

In the Mississippi scheme, the State Board of Education overrides local boards, and students in districts that have been taken over are permitted to transfer to other systems.

Four states took broader approaches to accountability. Hawaii replacedexisting law on reporting the results of assessments with a more comprehensive system.[35] The new law will become effective in two years. The Hawaii DOE must now create a system that links authority and adequate resources to responsibility; defines clear roles for all parties, lines of responsibility, and mutual obligation; involves fair and adequate assessment against agreed-upon goals; invokes appropriate actions (assistance, rewards, sanctions) for observed performance; involves a student assessment program that is explicitly aligned with the Hawaii content and performance standards; and involves comprehensive school profiles and report cards for each school. Indiana required each school corporation and school to develop an annual strategic and continuous improvement plan, including a professional development plan.[36] The DOE must collect data to assess each school in a corporation and intervene in the direction of schools that do not show improvement. Recognition and financial awards will be provided for schools that show improvement. The legislation repeals a performance-based provision that requires measuring performance in light of the school's socioeconomic factors. Virginia adopted the Education Accountability and Quality Enhancement Act of 1999, which requires evaluation of superintendents by boards, evaluation of administrators by superintendents, quality standards for training school administrators, and the use of a professional teachers' examination for entry into teacher training programs.[37] Washington created the Academic Achievement and Accountability Commission to adopt and revise improvement goals, identify the passing standard for new assessments, establish criteria for schools or districts that should be recognized or are in need of additional assistance, and identify schools in need of state intervention.[38]

Of the variety of accountability approaches adopted in 1999, there were decidedly more sticks than carrots. Two states, however, added reward systems. California provided an incentive program through the Certified Staff Performance Incentive Act, which provides one-time performance bonuses for teachers and other certified employees in underachieving schools whose pupils' academic performance improves significantly.[39]

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[35] 1999 Haw. Sess. Laws 74.
[36] 1999 Ind. Acts 1750.
[37] 1999 Va. Acts 1030.
[38] 1999 Wash. Legis Serv. 388 (West).
[39] 1999 Cal. Stat. 52.

Louisiana permitted local boards to establish and implement incentive compensation programs for employees to reward performance meeting or exceeding goals set for schools in its accountability system.[40]

Finally, California set the stage for another cycle of evaluation when it established a joint legislative committee to develop a "Master Plan for Education-Kindergarten through University."[41] The master plan is expected to provide a blueprint for education in the 21st century, to support lifelong learning for all Californians, and to serve as an example to other states by raising the standard for educational excellence.[42]

Advertising

Three states addressed controls on advertising in schools. Arkansas required solicitors for advertisements on school calendars to disclose whether schools will receive money, and if so, what percentage of the funds derived from sale of the calendars will be returned to the schools.[43] If schools do not receive money from calendar sales, this fact must be clearly and conspicuously disclosed at the time of solicitation, both orally and in writing. California directed its State Board of Education not to adopt instructional materials that provide unnecessary exposure to commercial brand names, products, or corporate or company logos, and specified that materials containing these commercial references be adopted only after a specific finding that the use of the reference is appropriate. Each local school board, therefore, must make a specific finding of appropriateness before adopting any materials that include commercial references.[44] California also passed legislation prohibiting local boards from entering into contacts granting exclusive advertising rights to the sale of carbonated beverages, unless they hold hearings and adopt policies to assure that internal controls are in place.[45] New York prohibited the placement of advertising on school buses, except in cities with a population of a million or more.[46]

Attendance

The greatest amount of legislative activity about school attendance concerned parental roles and school responsibilities involving parents.

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[40] 1999 La. Sess. Law Serv. 1128 (West).
[41] 1999 Cal. Stat. 43.
[42] Id.
[43] 1999 Ark. Acts 1284.
[44] 1999 Cal. Stat. 276.
[45] 1999 Cal. Stat. 374.
[46] 1999 N. Y. Laws 415.

Arkansas provided for a $500 fine for parents who give a false address to permit their child to enroll in a school other than where the pupil is zoned to attend.[47]

Maine required superintendents to make good faith efforts to meet with parents and explain the value of attending school before contacting law enforcement for habitual truancy.[48] New Hampshire deleted a requirement that parents must provide written notice of withdrawal from school sixty days prior to withdrawal.[49] Virginia amended its compulsory attendance law to require principals to contact parents after five days of absence and to permit juvenile authorities to make informal inquiries before initiating more formal proceedings.[50] Virginia also allowed compulsory attendance requirements to be satisfied for any student age sixteen or older on a meeting with the pupil and his or her parents in which an individual student alternative education plan is created to ensure career counseling and enrollment in a GED program.[51]

School attendance legislation also increased the number of immunizations required for school admittance. California added varicella (chicken pox) to the list of required immunizations, contingent upon appropriations.[52] Louisiana added immunization for hepatitis B for entry into middle school.[53] New York required immunization for varicella for enrollment at all grade levels[54] and immunization for hepatitis B for the seventh grade.[55] North Dakota added hepatitis B and haemophilus influenza type B (Hib) to the immunizations required for school admissions.[56] Virginia required immunization for hepatitis B before admission into sixth grade.[57]

Two states addressed additional screenings for admission into school. Florida allowed school boards to adopt a policy requiring a child to show that he or she knows how to swim prior to enrollment in school.[58] Texas directed that all public and private schools admitting students aged five to twenty-one screen for acanthosisnigricans, a skin condition that may signal high insulin levels.[59]

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[47] 1999 Ark. Acts 663.

[48] 1999 Me. Legis. Serv. 198.

[49] 1999 N. H. Laws 39.

[50] 1999 Va. Acts 526

[51] 1999 Va. Acts 552.

[52] 1999 Cal. Stat. 747.

[53] 1999 La. Sess. Law Serv. S. C. Res. No. 5 (Pamphlet No. 2, p. A-1).

[54] 1999 N. Y. Laws 416.

[55] 1999 N. Y. Laws 376.

[56] 1999 N. D. Laws S. B. 2126.

[57] 1999 Va. Acts 738.

[58] 1999 Fla. Sess. Law Serv. 338 (West).

[59] 1999 Tex. Sess. Law Serv. 856 (Vernon).

Arkansas, Missouri, Ohio, and Tennessee moved to let children of school employees attend school where their parents work, regardless of the district of their residence.[60]

Louisiana required private schools to provide written notification when a student enrolled in their programs and to provide written notification to the public school that the pupil had previously attended.[61]

Texas permitted local districts to limit the number of days a student may be absent to participate in extracurricular activities; however, the policy must permit at least ten days of absence.[62]

Virginia permitted students who live in housing that is divided by jurisdiction lines to attend a school in either jurisdiction.[63]

Buildings and Grounds

More legislation on school buildings and grounds arose in California last year than in all other states combined. In 1999, California passed several acts related to facilities construction in connection with the Greene Act of 1998.[64] One act provides that no less than 3% of construction or modernization costs go to disabled veteran business enterprises.[65] Another act required school districts to certify that an energy analysis and report has been prepared that sets forth utility savings that would be generated if energy efficient and renewable energy technology is employed in the design.[66] A third act provides funding for 50% of the costs of evaluation of hazardous materials and for 50% of the costs for removal of hazardous waste.[67]

Three more buildings and grounds-related California acts are worthy of mention. First, the Department of General Services was directed to conduct an inventory of public school buildings constructed by concrete tilt-up or with non-wood frame walls that do not meet the Uniform Building Code and report its findings to the Legislature and Governor.[68] Next, local districts were required to give written notice to the Department of Transportation of the proposed acquisition of a school site within two miles of an existing airport.[69] Finally, local boards were ordered to set aside funds for deferred maintenance of school facilities and to hold public hearings to discuss proposals and plans for expenditure of funds for that purpose.[70]

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[60] 1999 Ark. Acts 947. 1999 Mo. Legis. Serv. 168, sec. A (Vernon). 1999 Ohio Legis. Serv. 238 (Baldwin). 1999 Tenn. Pub. Acts 511.

[61] 1999 La. Sess. Law Serv. 408 (West).

[62] 1999 Tex. Sess. Law Serv. 1482 (Vernon).

[63] 1999 Va. Acts 988.

[64] 1998 Cal. Stat. 940, sec. 2.

[65] 1999 Cal. Stat. 133.

[66] 1999 Cal. Stat. 981.

[67] 1999 Cal. Stat. 992.

[68] 1999 Cal. Stat. 622.

Connecticut required school districts to adopt policies about the application of pesticides on school grounds and inform parents when pesticides are applied.[71] The legislation also prohibits the application of pesticides during business hours.

Illinois created a $260 million Fund for Illinois' Future for public infrastructure needs, including buildings, equipment, vehicles, community programs, and recreation facilities.[72] The law also authorizes school maintenance project grants, with up to $50,000 allocated per project.

Wyoming set up a reporting system to address building construction needs and created a system to attempt to equalize funding for construction programs.[73]

Curriculum Requirements

The state legislatures continued to add required curricular components for schools in 1999. While reading had been the dominant curriculum area addressed by the states in the prior year, in 1999 the legislatures turned to character and patriotism education as the leading topics. Reading and health education, as well as disparate other topics, were also addressed. This section describes curriculum requirements written into state law during the last year.

Seven states adopted legislation related to character education or patriotism. Florida required each district to adopt patriotic programs to encourage greater respect for the United States government, its national anthem, and its flag.[74] Students are required to recite the Pledge of Allegiance daily, and when the national anthem is played, all students and citizens are required to stand at attention, with men removing head coverings unless they are worn for religious purposes. Other Florida legislation required districts to offer character development programs in elementary grades, secular in nature, but stressing the qualities of attentiveness, patience, and initiative.[75]

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[69] 1999 Cal. Stat. 837.

[70] 1999 Cal. Stat. 390.

[71] 1999 Conn. Legis. Serv. 165 (West).

[72] 1999 Ill. Legis. Serv. 91-38 (West).

[73] 1999 Wyo. Sess. Laws 168.

[74] 1999 Fla. Sess. Law Serv. 276 (West).

[75] 1999 Fla. Sess. Law Serv. 347 (West).

Georgia replaced previous character education requirements when it adopted the Improved Student Learning and Environment and Discipline Act of 1999.[76] The character education curriculum must focus on courage, patriotism, citizenship, honesty, fairness, respect for others, kindness, cooperation, self-respect, self-control, courtesy, compassion, tolerance, diligence, generosity, punctuality, cleanliness, cheerfulness, school pride, respect for the environment, respect for the Creator, patience, creativity, sportsmanship, loyalty, perseverance, and virtue.

Louisiana required fifth-grade students, when addressing or responding to school employees during the 1999-2000 school year, to refer to them as "Sir," "Ma'am," or "Mr," "Mrs.," or "Ms." (Surname).[77] The courtesy requirement expands a grade level each year until it applies to all grades K-12 in the 2006-2007 school year. Louisiana also directed that a program of instruction on the United States flag, including history, etiquette, and customs in displaying the flag, be part of the fifth grade social studies curriculum by the 2000-2001 school year.[78]

Although it did not supply a list of included subjects, Mississippi authorized school districts to develop and implement a comprehensive program for character education.[79]

Ohio required each school district to observe and devote time to teaching the importance of Veteran's Day for at least one hour or one standard class period.[80] Oklahoma permitted local school boards to implement a comprehensive K-6 program in character education, which minimally may include the voluntary reciting of the Pledge of Allegiance.[81]

Virginia required all school boards to provide character education addressing the character traits of trustworthiness, respect, responsibility (including hard work and economic self-reliance), fairness (including the consequences of bad behavior and principles of nondiscrimination), caring, and citizenship (including patriotism, the Pledge of Allegiance, and respect for the flag).[82]

Three states added health curriculum items. Missouri required that courses and materials on human sexuality present sexual abstinence as the preferred behavior choice.[83] New Jersey required districts to provide instruction on breast self-examination as part of its core curriculum.[84] New

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[76] 1999 Ga. Laws (H.B.) 605, No. 1.

[77] 1999 La. Sess. Law Serv. 917 (West).

[78] 1999 La. Sess. Law Serv. 672 (West).

[79] 1999 Miss. Laws 458.

[80] 1999 Ohio Legis. Serv. 1978 (Baldwin).

[81] 1999 Okla. Sess. Laws 113.

[82] 1999 Va. Acts 944.

[83] 1999 Mo. Legis. Serv. 20 (Vernon).

[84] 1999 N. J. Laws 128.

York added cardiopulmonary resuscitation as a permissible subject in health education.[85]

Two states addressed reading curricula. California established the Elementary School Intensive Reading Program to make increased funding available for programs in grades one to four that provide multiple, intensive reading opportunities.[86] In metropolitan school districts, Missouri established a pilot project of explicit phonics instruction for students in grades K-3.[87]

Three states provided direction on graduation requirements or grading. Connecticut directed local and regional educational agencies to establish written policies about weighted grading for honors and advanced placement courses.[88] Oklahoma increased graduation requirements to four units of language arts and three units each in math, science, and social studies.[89] Oklahoma also permitted classes in American Sign Language to be granted the same credit as foreign language classes.[90] South Carolina directed its State Board of Education to establish a uniform grading scale, standards defining honors courses, and the determination of courses and weightings to be used in calculating class rank.[91]

Other new curriculum areas identified by legislation are described below. California established eligibility criteria for residential outdoor science programs and directed the Superintendent of Public Instruction to apportion money to fund the programs.[92] California also required the Office of Emergency Services, with the State DOE, the Department of General Services, and the Seismic Safety Commission, to develop an educational pamphlet for use in grades K-14 to identify and mitigate risks posed by nonstructural earthquake hazards.[93]

California enacted the Agricultural Education Act of 1999, which requires the DOE to establish a comprehensive agricultural education program for pre-kindergarten.[94] In a move apparently designed to take away teacher discretion in selecting instructional materials, California directed its State Board to adopt instructional materials for pupils in kindergarten and grades one to eight, inclusive;[95] these materials must align with adopted content standards.

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[85] 1999 N. Y. Laws 269.
[86] 1999 Cal. Stat. 2.
[87] 1999 Mo. Legis. Serv. 168, sec. A, 8 (Vernon).
[88] 1999 Conn. Legis. Serv. 81 (West).
[89] 1999 Okla. Sess. Laws 320, sec. 1.
[90] 1999 Okla. Sess. Laws 35.
[91] 1999 S. C. Acts 41.
[92] 1999 Cal. Stat. 958.
[93] 1999 Cal. Stat. 294.
[94] 1999 Cal. Stat. 965.

Mississippi required its State Board of Education to develop a curriculum and course of study on personal money management skills.[96]

Oklahoma directed its State Board to adopt a social studies core curriculum with courses reflective of the racial, ethnic, religious, and cultural diversity of the United States.[97]

Virginia stipulated that local school boards must include art, music, and physical education among their programs of instruction.[98] Further, it directed the State Board to incorporate standards for learning in mathematics, English, and social studies into vocational education.[99]

Employment

This section discusses employment-related legislation passed by state legislatures in 1999.

Substantive rights, including tenure, contract, and nondiscrimination rights that were established by legislation last year are listed below.

The Alaska legislature amended the teacher tenure law to clarify that when a tenured teacher discontinues service in a district, he or she may reacquire tenure by returning to the district within one year.[100] A new section was also added to the tenure law to provide that when a tenured teacher moves to a new district, he or she acquires tenure in the new district on the first instructional day of the teacher's third year there.[101]

California announced a state policy to afford all persons in public school and post-secondary institutions equal rights and opportunities regardless of their race, color, religion, ancestry, national origin, disability, sexual orientation, or because they are perceived to have one or more of these characteristics.[102] Districts there must pay interest to a teacher if his or her salary is not paid in a timely manner.[103] California also authorized an employee and a school board to agree that a resignation will be accepted at a mutually agreed upon date not more than two years in the future.[104] Additionally, California passed legislation to protect "whistleblowers" by prohibiting state or local government employers from interfering with the right of a person to disclose an improper governmental activity to an investigating committee of the Legislature.[105]

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[95] 1999 Cal. Stat. 15.

[96] 1999 Miss. Laws 360.

[97] 1999 Okla. Sess. Laws 294.

[98] 1999 Va. Acts 444.

[99] 1999 Va. Acts 435.

[100] 1999 Alaska Sess. Laws 89 (S.B. 98).

[101] *Id.*

[102] 1999 Cal. Stat. 587.

[103] 1999 Cal. Stat. 287.

To be deemed "working a full school year," teachers in Colorado who are hired after the beginning of the school year must now work 120 rather than 90 school days.[106]

Idaho permitted boards of trustees to enter into supplemental contracts for extra duty assignments performed by certified employees.[107] A supplemental contract is separate and apart from a regular teaching contract and is renewable for one year. While no property right vests in a supplemental contract, each board must follow procedures for informal review if the contract is not reissued.

Illinois amended its law relating to the creation and operation of cooperative high schools by two or more districts to spell out provisions for transfer of tenure rights, lay-offs, and recalls.[108] It also specified that upon acceptance of a multiyear contract, superintendents, principals, or other administrators do not lose any previously acquired tenure credit within the school district.[109]

North Carolina added to statutory language, providing a duty-free lunch period by including the requirement that principals shall not unfairly burden a teacher by making him or her give up a duty-free period on an ongoing, regular basis without consent.[110]

North Carolina also limited non-instructional duties of beginning teachers and teachers with twenty-seven or more years of experience, unless individuals request extracurricular assignments in writing.[111]

In Vermont, municipalities in which strikes are permitted cannot permanently replace striking employees.[112]

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[104] 1999 Cal. Stat. 80.
[105] 1999 Cal. Stat. 156.
[106] 1999 Colo. Sess. Laws. 48.
[107] 1999 Idaho Sess. Laws 208.
[108] 1999 Ill. Legis. Serv. 91-63 (West).
[109] Ill. Legis Serv. 91-314 (West).
[110] 1999 N. C. Adv. Legis. Serv. 163, no. 2.
[111] 1999 N. C. Adv. Legis. Serv. 96, no. 7.
[112] 1999 Vt. Laws S. 90.

Legislation related to procedural rights for school employees follows. Arkansas amended its Teacher Fair Dismissal Act to permit notice of nonrenewal to be delivered in person.[113] In providing notice of dismissal, school boards must give a statement of the reasons in separately numbered paragraphs to give a teacher an opportunity to prepare a defense. At the dismissal hearing, boards are prohibited from considering any reasons not specified in the notice. Arkansas now requires the superintendent, rather than the local board, to report licensure violations of teachers.[114] Arkansas amended legislation regarding grievance procedures to provide that appeals must be addressed at the next regular meeting of the board. When the administration believes the situation is not grievable, a teacher must be given an opportunity to present the question of grievability to the board for a final decision with the right to present and question witnesses.[115]

Louisiana required school boards to advertise the openings for superintendencies at least thirty days prior to taking steps to fill a vacancy.[116]

Montana lengthened the time teachers have to appeal adverse employment decisions and increased the time by which the board must set a hearing date.[117]

North Carolina permitted school boards to conduct teacher dismissal hearings within ten rather than five days.[118]

North Dakota required school boards to discuss teacher suspensions in executive session, unless the teacher and board agree to address the matter publicly.[119]

South Dakota changed the time frame for appealing teacher dismissals so that individuals must now request a hearing within fifteen days of receiving notice of dismissal, and the board must conduct a hearing within fourteen to forty-five days of receipt of the teacher's request for a hearing.[120] South Dakota also established April 15 as the date for notice of non-renewal of teaching contracts.[121]

Five states discussed certification requirements for school employees. By 2006-2007, teachers in Arkansas must be licensed for the grade level or subject in which they are assigned, while substitutes working more than thirty consecutive school days must have a bachelor's degree.[122] New Jersey required buildings and grounds supervisors to be certified educational facilities managers.[123] New Jersey also required public school health services to be provided by a certified school nurse[124] and athletic trainers to be certified.[125] New York required that instructors of cardiopulmonary resuscitation (CPR) in health education classes be certified health education teachers and certified in CPR instruction.[126] Oklahoma required teachers in alternative schools to be certified.[127] On the other hand, Missouri prohibited the requirement of a teaching certificate for any person teaching in a public school program linking education and careers, such as a school-to-work program.[128]

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[113] 1999 Ark. Acts 852.
[114] 1999 Ark. Acts 779.
[115] 1999 Ark. Acts 1498.
[116] 1999 La. Sess. Law Serv. 857 (West).
[117] 1999 Mont. Laws 514.
[118] 1999 N. C. Adv. Legis. Serv. 96, no. 1.
[119] 1999 N. D. Laws H. B. 1224.
[120] 1999 S. D. Laws S. B. 1210.
[121] 1999 S. D. Laws S. B. 179.

Two states addressed shared leave and sick leave banks. Arkansas gave school districts the authority to permit certified employees who are husband and wife to share accumulated sick leave.[129] The same act also authorized the creation of sick leave banks for classified employees. Other Arkansas legislation allows school employees to carry their accumulated leave credit to another school district, state education agency, educational corporation, or two-year college.[130] North Carolina permitted public school and state agency employees to share leave voluntarily with immediate family members who are also employees of public schools or state agencies.[131]

Five states attempted to reduce a shortage of certified teachers by permitting retired teachers to return to teaching without the same penalties that had previously existed.[132]

Finance and School Business

This section describes legislative provisions related to school finance and school business other than appropriations bills.

Two different approaches for channeling additional funds to education arose in Alabama and Louisiana. Alabama passed legislation amending its state constitution by creating a lottery to fund educational initiatives.[133] Voters in Alabama subsequently rejected the proposed amendment.

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[122] 1999 Ark. Acts 1382.
[123] 1999 N. J. Laws 337.
[124] 1999 N. J. Laws 153.
[125] 1999 N. J. Laws 87.
[126] 1999 N. Y. Laws 269.
[127] 1999 Okla. Sess. Laws 216.
[128] 1999 Mo. Legis. Serv. 168, sec. A. (Vernon).
[129] 1999 Ark. Acts 40.
[130] 1999 Ark. Acts 774.
[131] 1999 N. C. Adv. Legis. Serv. 170, no. 2.
[132] 1999 Cal. Stat. 40. 1999 Mich. Legis. Serv. 68. 1999 Mo. Legis. Serv. 514 (Vernon). 1999 N. D. Laws S. B. 2282. 1999 Okla. Sess. Laws 411.

Louisiana provided for prestige license plates for public and private high schools with a minimum of 100 applicants for the license plate.[134] The color and design of the plates will be selected by each high school's student council, subject to the approval of the principal, and a $25 royalty fee will be returned to the school for each plate sold.

Four states altered their bidding requirements. Arkansas raised the level at which bids are required on construction and maintenance contracts from $30,000 to $50,000.[135] Kansas exempted the purchase of natural gas from the sealed bid requirement.[136] Montana specified that bidding is not required for contracts for services such as engineers, architects, attorneys, actuaries, private investigators, physicians, or accountants.[137] Texas also clarified that contracts for professional services do not require competitive bids.[138]

Three states passed measures related to school business functions. Individual schools in Arkansas school systems, not just districts as a whole, are now authorized to maintain petty cash funds.[139] Also in Arkansas, governmental agencies and political subdivisions (presumably including schools) are now permitted to use electronic signatures to promote the development of e-government and e-commerce under guidelines developed by the Secretary of State.[140] California placed limits on the ability of the county superintendents of schools to dispose of items of personal property.[141] Now, county superintendents must obtain independent valuations of the property, advertise its sale, and obtain approval from the county board of education. Illinois amended annual budget provisions to specify that a school board's failure to adopt an annual budget in compliance with statutory requirements shall not affect the validity of any tax levy of the district that otherwise conforms with the law.[142] In addition, Illinois permitted the payment of moneys raised from public funds by checks, as defined by the Uniform Commercial Code.[143] Previously, payment was by warrants only.

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[133] 1999 Ala. Acts 8. 1999 Ala. Acts 304.
[134] 1999 La. Sess. Law Serv. 945 (West).
[135] 1999 Ark. Acts 663.
[136] 1999 Kan. Sess. Laws 186.
[137] 1999 Mont. Laws 368.
[138] 1999 Tex. Sess. Law Serv. 1225 (Vernon).
[139] 1999 Ark. Acts 47.
[140] 1999 Ark. Acts 718.
[141] 1999 Cal. Stat. 838.
[142] 1999 Ill. Legis. Serv. 91-75 (West).
[143] 1999 Ill. Legis. Serv. 91-151 (West).

Three states added new legislation related to bond issues. In the School Bond Guaranty Act, Idaho pledged not to alter, impair, or limit the rights vested in bonds until they are fully paid.[144] The Act requires the State Treasurer to monitor the financial affairs and conditions of districts and to report annually to the Governor, Legislature, and State Superintendent of Public Instruction. Illinois set aside general debt limitations, in a bonded capacity as otherwise set by law, to permit school districts to incur debt beyond those limits where certified by the Capital Development Board.[145] Iowa permitted any county, city, fire district, or school district with overlapping or contiguous property to issue bonds jointly and to issue contracts for construction, maintenance, acquisition, furnishing, and operation of buildings.[146]

Governance

This section identifies changes and additions made in the states related to school governance. Arkansas decreased membership on its State Board of Education from twelve to nine members.[147] On the local level, Arkansas passed two provisions related to board membership. First, local board members must reside in the school district from which they were elected throughout their service on the board.[148] The second act eliminated county boards of education, leaving only boards of school districts as local governance structures within the state.[149]

Colorado passed legislation permitting school districts with less than 15,000 students and with K-12 attendance centers to de-consolidate until July 1, 2001, to create smaller districts.[150]

Illinois provided for the dissolution of a school district within a military base or installation when it does not have a school board and is not operational for two years.[151] Illinois also added "conviction of a violent crime against a child" to the list of reasons for which elective offices can become automatically vacant.[152] In related legislation, Illinois listed offenses for which membership on a local school council is prohibited and required a criminal background check for membership on a council.[153]

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[144] 1999 Idaho Sess. Laws 328.
[145] 1999 Ill. Legis. Serv. 91-55, sec. 5 (West).
[146] 1999 Iowa Legis. Serv. 153 (West).
[147] 1999 Ark. Acts 885.
[148] 1999 Ark. Acts 898.
[149] 1999 Ark. Acts 1078.
[150] 1999 Colo. Sess. Laws 232.
[151] 1999 Ill. Legis. Serv. 91-460 (West).
[152] 1999 Ill. Legis. Serv. 376 (West).

Indiana stipulated that a member of the Higher Education Commission is not a public officer; thus there is no conflict of interest in holding a public office and a commission seat.[154]

Maine prohibited school board members or their spouses from serving as volunteers in curricular, cocurricular, or extracurricular programs or activities and reporting directly to an administrator over whom the board member has jurisdiction.[155]

Minnesota prohibited sex offenders from running for office as school board members.[156]

Montana removed a provision making school district trustees jointly and individually liable to the district for consenting to use moneys illegally[157] and lengthened the time from fifteen to twenty-five days before an election that the clerk of a school district must produce a certified list of candidates for election.[158]

New Jersey prohibited conflicts of interest where school officials or members of their immediate families have an interest in a business organization or engage in any business, transaction, or professional activity that is in substantial conflict with the proper discharge of their duties in the public interest.[159]

North Dakota adopted a nepotism law that prohibits school officials from supervising or entering into contracts with close family members.[160]

North Dakota also encouraged consolidation of school districts by providing a bonus of $500,000 for districts that do so.[161] South Dakota encouraged consolidation by adjusting the weighting of average daily membership in its funding formula.[162]

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[153] 1999 Ill. Legis. Serv. 622 (West).
[154] 1999 Ind. Acts 1821.
[155] 1999 Me. Legis. Serv. 128.
[156] 1999 Minn. Sess. Law Serv. 101 (West).
[157] 1999 Mont. Laws 310.
[158] 1999 Mont. Laws 514.
[159] 1999 N. J. Laws 256.
[160] 1999 N. D. Laws H. B. 1359.
[161] 1999 N. D. Laws S. B. 2441.
[162] 1999 S. D. Laws S. B. 209.

Parental and Student Rights

This section discusses 1999 legislation about parental or student rights. Twelve states addressed the rights of parents and students in legislation last year. Some laws were designed to protect privacy interests or promote religious exercise, while others supported communication between school officials and parents. Two states imposed limits on disciplinary procedures and two other states clarified the right of parents to exempt their children from exposure to information about human sexuality. Legislation related to parental and student rights are discussed below.

Alaska recognized religious freedom as a fundamental but eroding constitutional right and passed a joint resolution urging Congress to adopt an amendment to the Constitution to allow a moment of silence for the purpose of voluntary prayer in public schools.[163] Further, Alaska added the qualifier of "personal" to "private family affairs" that may not be surveyed by questionnaire[164] to a previously existing law restricting the use of student surveys.

Florida law was amended to specify that HIV/AIDS is a disease about which students are not required to learn.[165] Previously, a religious reason needed to be cited in order to be exempt from exposure to information about certain diseases. A reason for exemption is no longer necessary.

Illinois placed limits on the types of rooms that can be used for time-out and limits on when physical restraint is authorized.[166] Time-out cannot take place in a room where a student cannot be observed continuously, in a locked room other than one with a special locking mechanism, or in a confined space such as a closet or box. Schools must maintain records on the use of time-out and notify parents or guardians when it is used. Physical restraint is authorized only when a student poses risk of harm to him or herself or others, when there are no medical contra-indications, and when staff members are trained to use it. Louisiana required school administrators and their designees to excuse themselves when they are required to make a recommendation, decide an issue, or take action in a matter involving the discipline of a pupil who is a member of their immediate family.[167] In addition, Louisiana clarified that, in conducting an expulsion hearing, a superintendent is charged with determining the facts of the case and making a judgment of guilt in conduct warranting expulsion.[168] In other legislation,

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[163] 1999 Alaska Sess. Laws Legislative Resolve 27 (S.J.R. 25).

[164] 1999 Alaska Sess. Laws 63 (H.B. 70).

[165] 1999 Fla. Sess. Law Serv. 344.

[166] 1999 Ill. Legis. Serv. 91-600 (West).

[167] 1999 La. Sess. Law Serv. 1061 (West).

[168] 1999 La. Sess. Law Serv. 766 (West).

Louisiana struck the word "silent" from its silent prayer or meditation statute.[169] The legislation allows an opportunity at the beginning of each school day, for those students and teachers desiring to do so, to observe a brief time in prayer or meditation.

Maine prohibited publishing on the Internet any personal information about students without first obtaining written parental consent.[170]

Missouri required that parents be notified about the content of materials used in teaching human sexuality and informed of their right to inspect the materials.[171] Parents may also elect to remove their children from classes on human sexuality.

New York allowed parents to sign a waiver of transportation for their children, thereby altering the requirement that schools reserve seats on school buses for children, even if they are not used.[172]

Rhode Island required employers to provide parental leave for school involvement for parents, foster parents, and guardians employed for twelve months.[173] Employees covered by this legislation receive twenty-four hours of leave every twelve months for school conferences and other school-related activities.

Tennessee passed the School Employee Religious Liberty Act of 1999 to clarify the rights of employees under the First Amendment.[174] Among the rights listed are the right to read religious books during non-instructional time; the right to say grace before a meal; the right to wear religious garb or jewelry that does not disrupt the school environment; and the right to meet with other school employees for prayer or scriptural study before or after school or during an employee's lunch. Tennessee also directed every local education agency to develop a policy setting forth the rights of parents and students as well as guidelines for teachers and principals with respect to the administration of surveys, analyses, or evaluation of pupils.[175]

Texas required school officials to notify parents when they have assigned an uncertified or inappropriately certified teacher to the same classroom for more than thirty consecutive school days.[176] Texas also required schools to give written notice at least once every three weeks if a student's performance in the foundation curriculum is unsatisfactory.[177]

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[169] 1999 La. Sess. Law Serv. 904 (West).
[170] 1999 Me. Legis. Serv. 17.
[171] 1999 Mo. Legis. Serv. 20 (Vernon).
[172] 1999 N. Y. Laws 129.
[173] 1999 R. I. Pub. Laws 64.
[174] 1999 Tenn. Pub. Acts 384.
[175] 1999 Tenn. Pub. Acts 83.
[176] 1999 Tex. Sess. Law Serv. 680 (Vernon).
[177] 1999 Tex. Sess. Law Serv. 1237 (Vernon).

Utah prohibited the administration of surveys or tests without parental permission, such as psychological testing, to obtain sensitive information, such as political or religious affiliation, sexual behavior, or critical appraisals of individuals in close family relationships.[178]

Virginia directed regular licensed school personnel who have reason to believe that a student is at imminent risk for suicide to make immediate contact with the parent, to make the parent aware, and to ask whether the parent wishes or has obtained counseling services.[179] Another Virginia law required local boards to notify students and parents of the availability of and qualifications for admission for advanced placement classes and International Baccalaureate programs.[180]

Program Development

Last year the states continued to use a programmatic approach to address particular problems. If anything, the programs offered for development were decidedly more foundational. Language acquisition, early childhood and school readiness, and primary grade success, especially in reading, were dominant themes. This section describes legislative acts related to school program development.

Three states acted to foster English language acquisition, particularly among immigrants. The Arizona legislature began preliminary study of English as a Second Language (ESL) and bilingual education programs by creating a committee to conduct hearings and study academic research on the time it takes students to gain proficiency in English, on the availability of qualified teachers, and on the amount of funding and types of programs available.[181] California directed its Superintendent of Public Instruction to convene a work group to select an independent evaluator for the purpose of studying the effects of the implementation of Proposition 227 on the education of K-12 students in California.[182] California also established the English Language Acquisition Program to fund instructional support and to coordinate available services and funding.[183] Connecticut passed an act permitting local and regional school boards to limit the time a student may be in a bilingual education program.[184] Further, the law establishes a state standard and an assessment system for mastery of English.

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[178] 1999 Utah Laws 49.
[179] 1999 Va. Acts 425.
[180] 1999 Va. Acts 461.
[181] 1999 Ariz. Sess. Laws, Ch. 249, secs. 4, 5.
[182] 1999 Cal. Stat. 1009.
[183] 1999 Cal. Stat. 71.
[184] 1999 Conn. Legis. Serv. 211 (West).

Four states passed legislation related to early childhood education and school readiness. Colorado added more pilot site agencies to participate in an early education and school readiness program to be delivered by community-based consolidated childcare services.[185] Under the program, participants must integrate childcare with educational programs and evaluate the programs to show a measurable improvement in the overall quality of childcare. Florida created the Florida Partnership for School Readiness to prepare students for success in school.[186] County school superintendents, the Department of Children and Family Services, and leaders from county health departments and Head Start agencies must create plans to coordinate services. New Jersey permitted childcare programs to exist in public schools and waived the application of local zoning laws covering childcare centers in public schools.[187] South Carolina addressed school readiness by passing the First Steps to School Readiness Initiative.[188] The initiative supports multi-agency partnerships to improve the quality of early childhood development and school readiness.

Five states acted to ensure early success for students in primary grades, particularly in reading. Idaho required the delivery of an extended year reading intervention program of forty hours duration for students reading below grade level.[189] Iowa established the School Improvement Technology Block Grant Program, an early intervention program to reduce class size to seventeen in grades K-3 and to improve instruction in basic skills.[190] Maryland provided breakfasts for all children, regardless of family income, in participating schools[191] along with grants to reduce class sizes for reading instruction in grades one and two.[192] Pennsylvania established the Read to Succeed Program, a competitive grant program targeting K-3 students in need of additional assistance in learning to read.[193] South Carolina created the Governor's Institute of Reading to create a collaborative effort between education, businesses, and the community to ensure that children learn to read independently and well by the end of the third grade.[194] The program awards competitive grants for the design and implementation of a comprehensive approach to reading instruction based on best practices and provides teachers with professional development.

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[185] 1999 Colo. Sess. Laws 323.

[186] 1999 Fla. Sess. Law Serv. 357 (West).

[187] 1999 N. J. Laws 83.

[188] 1999 S. C. Acts 99.

[189] 1999 Idaho Sess. Laws 296.

[190] 1999 Iowa Legis. Serv. 21 (West).

[191] 1999 Md. Laws 385

[192] 1999 Md. Laws 513.

[193] 1999 Pa. Laws 36, sec. 6.

[194] 1999 S. C. Acts 100.

Colorado and Texas funded programs for at-risk students. Colorado passed the Student Dropout Prevention and Intervention Act to provide services to at-risk students and their families.[195] Other dropout prevention legislation required local school districts to report student transfers, and to permit tracking that helps identify dropouts.[196] Texas provided special funding for basic skills programs for ninth graders at risk of not earning sufficient credit to pass to tenth grade .[197]

Other programmatic approaches taken by legislatures are described as follows. Arkansas passed the Arkansas Foreign Language Act of 1999 to promote the instruction of foreign languages in public schools by creating a grant program for teacher training.[198] The Foreign Language Act also establishes the Arkansas Early Grades Foreign Language Pilot program to encourage foreign language programming, with an emphasis on Spanish, in grades K-6.

California established the Nell Soto Parent/Teacher Involvement Program, a grant program designed to strengthen communication between schools and parents.[199] California also adopted the Instructional School Gardens Program for the promotion, establishment, and support of instructional school gardens as a means of assisting in the teaching about the importance of proper nutrition.[200]

Texas provided $2,500 in grants to urban elementary schools for demonstration agricultural projects to improve understanding of agriculture.[201]

Louisiana required the Department of Health and Hospitals to develop a program to educate students on the dangers of gambling addiction and required the DOE to implement the program in the public schools and make it available to nonpublic schools.[202]

Utah established the Center for the School of the Future at Utah State University in order to promote best practices, encourage cooperation and research, and to develop relationships between public schools and higher education.[203]

Wyoming directed its Department of Employment to create a unified state plan for work activities and programs related to vocational education.[204]

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[195] 1999 Colo. Sess. Laws 251.
[196] 1999 Colo. Sess. Laws 268.
[197] 1999 Tex. Sess. Law Serv. 396 (Vernon).
[198] 1999 Ark. Acts 1573.
[199] 1999 Cal. Stat. 734.
[200] 1999 Cal. Stat. 713.
[201] 1999 Tex. Sess. Law Serv. 975.
[202] 1999 La. Sess. Law Serv. 1335 (West).
[203] 1999 Utah Laws 333.
[204] 1999 Wyo. Sess. Laws 166.

School Choice

Three states adopted new charter school legislation in 1999. However, the legislation season was marked more by states scrambling to adjust direction and control over the charter school movement that had been given life in prior years. Two states amended home schooling law to permit participation of home school students in extracurricular activities. Four states addressed the ability of students to transfer to other public schools or to private schools.

New charter school legislation emerged in Arkansas, Hawaii, and Oklahoma. Arkansas passed the Arkansas Charter Schools Act of 1999.[205] This law allows teachers, parents, pupils, and community members to establish and maintain public schools that operate independently from the existing structures of local districts. Under the law, charter schools are established by petition to the local boards. Upon approval by a local board, a petition is forwarded to the State Board of Education. The petition must include a plan for improvement, a set of performance-based objectives, student achievement objectives, and parental involvement provisions. The legislation also attempts to provide protection for certified teachers who transfer to and from charter schools. Hawaii provided for up to twenty-five New Century Charter Schools formed from existing public schools or created as a new school.[206] Before a charter school can open, a charter school board must be created with representation from the principal, the instructional and support staffs, parents, and community members. The charter must offer a detailed implementation plan that describes the administrative and educational framework; a plan for identification, recruitment, and selection of students; a plan for assessing student performance; the curriculum; an accountability plan; a governance structure; a facilities management plan; and annual financial and program audits. Charter schools are exempt from regulation except for laws related to collective bargaining, discrimination, and health and safety requirements. Oklahoma passed the Oklahoma Charter Schools Act, which provides structure for the creation of charter schools and grants exemptions from all statutes and rules relating to schools, with certain exceptions.[207]

The following states adjusted legislation over their charter schools. Arizona moved fiscal control over charter schools from the Auditor General to the State Board of Education and State Board for Charter Schools.[208]

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[205] 1999 Ark. Acts 890.

[206] 1999 Haw. Sess. Laws 62.

[207] 1999 Okla. Sess. Laws 320, sec. 6-18.

[208] 1999 Ariz. Sess. Laws, 1st S.S., Ch. 4, sec. 15.

Charter schools must submit questionnaires on compliance to the state education boards, with boards of education now being responsible for notifying charter schools when they fail to establish and maintain uniform systems of accounting records.

California extended provisions of existing law related to collective bargaining in public education to apply to charter schools.[209] California also placed new regulatory requirements on charter schools by requiring them to offer, at a minimum, a specified number of minutes of instruction and to maintain written contemporaneous pupil attendance records.[210] Students in charter schools must also participate in state testing programs, the same as other public school students, or a charter school will risk losing state funding.

Colorado clarified the status of charter schools for the purpose of tax-exempt financing as governmental entities, and specified that the financial obligations of charter schools do not become obligations of school districts unless the latter specifically assume the obligation.[211] Other legislation directed charter schools to describe in their charters a process for dispute resolution between them and authorizing school districts.[212]

Connecticut prohibited members or employees of a governing council for a charter school from having a financial interest in the school.[213] The legislation also added "failure to progress" as a cause for which the State Board of Education may revoke a charter.[214]

Florida amended its charter school law to permit charters to be fifteen years in length in order to accommodate access to long-term financial resources for charter school construction.[215] The legislation also created authority for the State Board of Education to enter into a performance contract with six school districts to establish a charter school district that would be exempt from certain statutes and State Board of Education rules. Separate legislation directed all charter schools to have private independent audits of their accounts and records.[216]

Illinois amended existing charter school legislation to limit to one the number of charter schools that a local board of education or an intergovernmental agreement may initiate.[217] Additionally, Illinois required certification by the State Board of Education of a charter school created by conversion from an existing private, parochial, or non-public school.[218] Such certification would follow a petition by 5% or more of the voters and a referendum on the matter of conversion.

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[209] 1999 Cal. Stat. 828.
[210] 1999 Cal. Stat. 162.
[211] 1999 Colo. Sess. Laws 294.
[212] 1999 Colo. Sess. Laws (H.B. 99-1274).
[213] 1999 Conn. Legis. Serv. 289.
[214] *Id.*
[215] 1999 Fla. Sess. Law Serv. 374 (West).
[216] 1999 Fla. Sess. Law Serv. 333 (West).
[217] 1999 Ill. Legis. Serv. 91-405 (West).

New Hampshire amended existing charter school legislation to extend from eighteen months to two years the time an applicant has to start up a school after the grant of a charter.[219] Other changes included allowing voters to raise and appropriate funds for charter schools and requiring independent fiscal audits. New Hampshire also expanded open enrollment provisions in cooperative school districts and authorized the creation of regional enrollment areas.[220]

Pennsylvania required teachers or administrators working in charter schools to comply with continuing professional education requirements to maintain their employment.[221]

Rhode Island doubled the number of authorized charter schools from ten to twenty.[222]

Texas prohibited a person who has been convicted of a crime of moral turpitude from serving as an officer or member of the governing body of a charter school.[223]

Virginia authorized the formation of regional charter schools by joint venture between two or more participating school districts.[224]

Three states supported school choice by addressing student transfers. Arizona required public schools to accept credits earned by a student transferring from a charter school in a uniform and consistent manner according to the same criteria used to accept academic credit from other private schools.[225] California authorized local districts to accept inter-district transfers and permit children whose parent or legal guardian works at a school to have priority in being accepted for inter-district transfer.[226] Florida created the Opportunity Scholarship Program, which permits students in failing schools to transfer to public schools that are performing satisfactorily or to attend eligible sectarian or nonsectarian private schools.[227]

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[218] 1999 Ill. Legis. Serv. 91-407 (West).

[219] 1999 N. H. Laws 101.

[220] 1999 N. H. Laws 106.

[221] 1999 Pa. Laws 529, no. 48, sec. 3.

[222] 1999 R. I. Pub. Laws 366.

[223] 1999 Tex. Sess. Law Serv. 1335 (Vernon).

[224] 1999 Va. Acts 449.

[225] 1999 Ariz. Sess. Laws, Ch. 9, sec. 1.

[226] 1999 Cal. Stat. 389.

[227] 1999 Fla. Sess. Law Serv. 398 (West).

Two states addressed the issue of participation in extracurricular activities by home-schooled students. Home-schooled children in Arizona may now try out for interscholastic sports, and school districts are prohibited from contracting with private entities that supervise interscholastic activities if the latter prohibit participation of home-schooled children.[228] North Dakota permitted home-schooled students to participate in extracurricular activities in public schools with the approval of the school administration.[229]

New Jersey established an inter-district choice program by creating up to ten inter-district choice districts within which resident students may exercise choice. Under this law, schools may enroll students across district lines in designated schools of the choice district.[230]

A control was placed on home-schooled children in Arkansas to the extent that students are now ineligible for home schooling when they are under disciplinary action for violating any written school policy, including unexcused absences.[231]

The final method of school choice supported by legislation in 1999 was the deregulation of public schools. Florida amended legislation related to deregulation of public schools to provide for exemption of teacher certification, to give the Commissioner authority to waive regulations to facilitate innovative practices, and to allow local schools to select their own educational methods.[232]

School Safety

In light of public perceptions about school safety, it is not surprising that this area generated the largest amount of legislation in 1999. More than ninety-three acts were found in this topic area, incorporating a variety of approaches to make children and school personnel safer in schools. Changes in criminal law, required exclusions or removal to alternative placements, better crisis planning, revision of conduct codes, increased interagency communication, criminal background checks, and removal of teaching certificates from teachers who prey on students were among the approaches adopted by the states. This section describes school safety legislation that was passed last year.

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[228] 1999 Ariz. Sess. Laws. Ch. 69, sec. 1.
[229] 1999 N. D. Laws S. B. 2199.
[230] 1999 N. J. Laws 413.
[231] 1999 Ark. Acts 1117.
[232] 1999 Fla. Sess. Law Serv. 253 (West).

The following states changed their criminal laws, either by designating more actions as criminal or by increasing the consequences of criminal activity. Arkansas amended its law by changing the prohibition of the possession of handguns to prohibit the possession of firearms—not just handguns—on developed property of public or private schools, including bus stops.[233]

California made interfering with a school activity by any adult or minor over the age of sixteen a misdemeanor punishable by up to a year in jail.[234] In the same legislation, California made making a terrorist threat against school personnel punishable by a fine, one to three years in state prison, or both.

Colorado criminalized hazing, defined as any activity that recklessly endangers the health or safety of others for the purpose of initiation into a student organization, by making it a Class 3 misdemeanor.[235]

Florida amended its criminal law related to trespass on school property to make it applicable to any school, not just public schools.[236]

Illinois was very active last year. Illinois made it a Class C misdemeanor for school personnel, including those in private schools, to fail to report to the principal the observation of a firearm in possession of any person except law enforcement personnel engaged in conducting their official duties.[237] Legislators also amended the criminal code to require a superintendent or board president to inform a principal when granting a sex offender permission to enter a school campus. A sex offender is responsible for notifying a principal when he or she arrives and leaves the building. In addition, a sex offender must remain under the direct supervision of a school official when in the presence of school children. A sex offender's failure to comply with the law is a Class 4 felony.[238] In addition, Illinois upgraded criminal designations for crimes committed on church or school properties.[239] For example, theft of property with less than $300 value was made a Class 4 felony instead of a Class A misdemeanor; theft of property between $300 and $10,000 value was made a Class 2 felony instead of Class 3 felony; and theft of property valued between $10,000 and $100,000 was made a Class X felony instead of a Class 1 felony. Illinois excluded treatment as a "delinquent minor" for persons age fifteen or older who are charged with aggravated battery with a firearm in a school.[240] The legislation also requires mandatory transfer of jurisdiction from juvenile court for minors age fifteen or more who are charged with committing aggravated discharge of a firearm in a school or within 1,000 feet of a school. Illinois made causing injury with a firearm to a teacher or employee on school property a Class X felony punishable by fifteen to sixty years of imprisonment.[241] Finally, Illinois made prostitution or solicitation of prostitution within 1,000 feet of a school a Class 4 felony.[242]

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[233] 1999 Ark. Acts 1282.
[234] 1999 Cal. Stat. 1013.
[235] 1999 Colo. Sess. Laws 121.
[236] 1999 Fla. Sess. Law Serv. 147 (West).
[237] 1999 Ill. Legis. Serv. 91-11 (West).
[238] 1999 Ill. Legis. Serv. 91-356.
[239] 1999 Ill. Legis. Serv. 91-360.
[240] 1999 Ill. Legis. Serv. 91-15 (West).

Louisiana made communicating a bomb threat a crime punishable by up to twenty years in prison and made carrying a dangerous weapon on school premises a crime punishable by one to five years in prison or a $2,000 fine.[243] Louisiana schools also have the duty to inform students of the consequences of violent acts on school property, at a school-sponsored function, and in a firearm-free zone.

Maine doubled the penalty for speeding in a school zone.[244]

Massachusetts created the crime of criminal trespass on a school bus.[245]

Michigan criminalized selling dietary supplements containing performance-enhancing compounds to students by school employees or volunteers who come into contact with students through their school roles.[246]

New York increased the penalties for speeding in a school zone.[247]

North Carolina added assault on school employees and volunteers who are discharging their duties as a form of criminal assault.[248] In addition, North Carolina expanded the range for punishing students who bring weapons on school property to provide coverage for any school-sponsored curricular or extracurricular activity.[249] North Carolina also made it a felony for school employees to take indecent liberties with pupils who are at least four years younger than they are, during or after the time that both are present together in the same school until the student ceases to be a student.[250] The same crime is a misdemeanor if the parties have fewer than four years difference in age; the provision is inapplicable if an employee and student are married to each other.

Texas prohibited school district employees from selling, marketing, or distributing dietary supplements containing performance-enhancing compounds, making this a Class C misdemeanor.[251]

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[241] 1999 Ill. Legis. Serv. 91-434 (West).

[242] Ill. Legis. Serv. 91-274 (West).

[243] 1999 La. Sess. Law Serv. 1236 (West).

[244] 1999 Me. Legis. Serv. 308.

[245] 1999 Mass. Adv. Legis. Serv. 102 (Law. Coop.)

[246] 1999 Mich. Legis. Serv. 187 (West).

[247] 1999 N. Y. Laws 484.

[248] 1999 N. C. Adv. Legis. Serv. 105, no. 1.

[249] 1999 N. C. Adv. Legis. Serv. 387, no. 4. 1999 N. C. Adv. Legis. Serv. 211, no. 2.

[250] 1999 N. C. Adv. Legis. Serv. 300, no. 3.

[251] 1999 Tex. Sess. Law Serv. 1086.

Virginia added to the list of weapons prohibited on school property knives with blades three inches or longer, except for knives used for the consumption or preparation of food.[252] Further, Virginia added the area 1,000 feet surrounding bus stops to places designated as drug-free school zones.[253] Virginia required two days of mandatory incarceration for battery of a school employee and six months of mandatory incarceration if a gun or other weapon is used.[254]

Other states added or amended provisions for criminal background checks of school employees. The following describes changes related to criminal background checks. The Alabama Child Protection Act of 1999 required a criminal history background check for all applicants and all current employees under review by a local school board or the State DOE.[255] The background check applies to all employees who have or applicants who will have unsupervised access to children in educational settings. Clergy are exempt from this requirement except when they act in the capacity of full-time classroom teachers. Superintendents or their designees must complete fingerprinting after receiving training from the Department of Public Safety. Non-public schools that do not wish to do the fingerprinting procedures for their applicants may not be required to do so, while applicants for non-public schools must request criminal background checks through the local public school district.

An amendment to Arkansas law clarified that the DOE is responsible for paying for criminal background checks.[256]

California prohibited the charging of fees for fingerprinting of persons who work with children from January 1, 2000, to July 1, 2000.[257] Fingerprinting will continue without a fee charge after July 1, 2000, if funds are appropriated.

Maine required fingerprinting and criminal background checks for all applicants for new or renewal teaching certificates.[258]

South Dakota required criminal background checks for persons employed at the state residential schools. [259]

Washington required criminal background checks for school employees and volunteers.[260]

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[252] 1999 Va. Acts 587.

[253] 1999 Va. Acts 873.

[254] 1999 Va. Acts 1036.

[255] 1999 Ala. Acts 361.

[256] 1999 Ark. Acts 226.

[257] 1999 Cal. Stat. 934.

[258] 1999 Me. Legis. Serv. 110. 1999 Me. Legis. Serv. 35.

[259] 1999 S. D. Laws S. B. 27.

[260] 1999 Wash. Legis. Serv. 21 (West).

The following states took a proactive approach and directed that schools develop crisis plans. Alaska's legislature required each school board to develop a model school crisis response plan for use by each school in the district. Each school must build its own school-specific crisis response plan, incorporating elements outlined within the legislation, and must form a crisis response team made up of the principal, a parent, a certified teacher, and a classified employee.[261]

Illinois created a Task Force on School Safety to develop uniform criteria for the development of school safety plans and school safety audits to be distributed to all public schools.[262] Illinois also developed the "Safe to Learn Program," a grant program addressing building security, violence prevention and intervention, crisis management, and training of teachers and other school personnel.[263]

Kansas urged all public and private elementary and secondary schools to create and update crisis plans and to facilitate the implementation of such plans by training personnel and conducting regular drills.[264]

Maine required local school units to work with local public safety, mental health, and law enforcement officials to develop a crisis response plan.[265]

Ohio required each school board to adopt a school safety plan that includes the protocol for addressing serious threats, how to respond to emergencies, and procedures for responding to threats and emergency events.[266]

Texas directed school districts to address goals for violence prevention and intervention on campus in their campus improvement plans.[267] The plans must also provide information about the rate, number, and type of violent or criminal activity on each campus.

Virginia required each school board to develop and have available on request a written school crisis and emergency management plan.[268] In addition, every principal is required to conduct a school safety audit.[269]

Two states addressed the problem of school safety by initiating mediation and peer counseling programs. Arkansas established a Youth Mediation Program at law schools in the state.[270] The program is charged with operating pilot projects offering mediation services for disputes in schools involving youth, juvenile delinquency cases, and cases involving dependency and neglect. The program is also required to provide training and technical assistance for elementary and secondary schools and for the juvenile courts, and to offer law school courses and continuing legal education for lawyers and other professionals. In another intervention approach, Illinois passed legislation requiring teacher instruction to focus on peer counseling and conflict resolution programs.[271]

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[261] 1999 Alaska Sess. Laws 78 (S.B. 125).
[262] 1999 Ill. Legis. Serv. 91-491 (West).
[263] Ill. Legis. Serv. 91-10 (West).
[264] 1999 Kan. Sess. Laws 5018.
[265] 1999 Me. Legis. Serv. 351.
[266] 1999 Ohio Legis. Serv. 124 (Baldwin).
[267] 1999 Tex. Sess. Law Serv. 510.
[268] 1999 Va. Acts 475.
[269] 1999 Va. Acts 516.
[270] 1999 Ark. Acts 628.

The following states addressed school safety by fostering better interagency communication and cooperation between school officials, juvenile justice systems, and other state agencies.

Arkansas required school principals to report all threats of violence or acts of violence to law enforcement agencies rather than to their supervisors. At the same time, prosecuting attorneys must report on the status of charges or the dispositions of cases to principals within thirty days.[272]

California required law enforcement agencies responsible for investigating reports of missing children to inform local school districts and private schools in writing and with a photograph of a missing child within ten days of the child's disappearance.[273] Also, districts and private schools in California were authorized to request that the State Department of Justice provide a subsequent arrest notification service; the Department of Justice was required to comply with these requests.[274] Finally, California passed the School Safety and Violence Prevention Act, a grant program to be administered by the Superintendent of Public Instruction for schools with grades eight through twelve. Schools will use the funds to provide conflict resolution personnel, on-campus communication devices, and staff training programs, and to support cooperative arrangements with law enforcement agencies.[275]

Colorado amended the authority of its juvenile parole board to require attendance at educational programs as a condition of parole.[276] However, the parole board may not require the juvenile to attend a school from which he or she has been expelled without prior approval of the local board of education.

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[271] 1999 Ill. Legis. Serv. 91-491 (West).
[272] 1999 Ark. Acts 1520.
[273] 1999 Cal. Stat. 832.
[274] 1999 Cal. Stat. 476.
[275] 1999 Cal. Stat. 51.
[276] 1999 Colo. Sess. Laws 24.

Connecticut required its State Department of Children and Families to provide notice to schools of potentially dangerous students in their custody.[277] Superintendents must notify principals of the disclosure. However, principals may disclose the information only to special services staff or consultants, such as psychologists or social workers. Presumably, principals may not disclose the information to classroom teachers.

Louisiana required its juvenile courts to transmit orders of adjudication of delinquency within twenty-four hours to the school principal where the juvenile is enrolled.[278] The principal may use the order in a disciplinary action in the school setting, including a hearing before the board. In addition, Louisiana created truancy and assessment and service centers in heavily populated parishes and directed multi-agency cooperation to address and intervene with juveniles who demonstrate destructive or criminal behavior.[279] The legislation directs boards to assist child welfare and attendance officers in creating student background data, including attendance records, unexcused absences, conduct violations, discipline records, report cards, and transcripts.

Maine directed district attorneys to provide information to school superintendents when a juvenile enrolled in the school is charged with the threatened use of physical force.[280] When a district attorney notifies a superintendent, the latter must construct a notification team, made up of the principal, a teacher, a parent or guardian, and a counselor, to discuss the juvenile's needs.

Michigan ordered boards to confer with local law enforcement agencies over its statewide school safety policy and begin compliance with the policy.[281] The legislation provides for more information-sharing between agencies, including the requirement that prosecuting attorneys notify school districts of any juvenile or criminal court action taken with respect to a pupil.

Mississippi funded a study of the need for a comprehensive system and multidisciplinary continuum of care and services for children who are excluded from school for misconduct, children with severe mental health problems, and neglected, abused, or delinquent children with serious emotional or behavioral problems.[282]

South Dakota required school officials to report weapons violations on school premises to local law enforcement authorities.[283]

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[277] 1999 Conn. Legis. Serv. 247 (West).

[278] 1999 La. Sess. Law Serv. 515 (West).

[279] 1999 La. Sess. Law Serv. 1372 (West).

[280] 1999 Me. Legis. Serv. 345.

[281] 1999 Mich. Legis. Serv. 102.

[282] 1999 Miss. Laws 587.

[283] 1999 S. D. Laws H. B. 1229.

Tennessee authorized local education agencies to act in partnership with local law enforcement agencies in hiring school resource officers.[284]

Texas permitted interagency sharing of records between school superintendents and the juvenile probation department.[285]

The following states added provisions related to school conduct codes. Arkansas passed the School Uniform Initiative Act to amend uniform dress code provisions, making it mandatory for school boards to create advisory committees.[286] The legislation makes the adoption of uniform dress requirements subject to local referendum if not acted upon by a board after a recommendation by its advisory committee. Further, teachers in Arkansas are authorized to remove students from class in order to maintain effective discipline.[287]

Georgia required each local board of education to adopt policies designed to enhance the student learning environment by improving student behavior and discipline.[288] Policies must have age-appropriate student codes of conduct containing standards of behavior, a student support process, progressive discipline, and parental involvement. Moreover, Georgia directed local boards to adopt policies applicable to grades six through twelve to prohibit bullying, punishable on the third occurrence by assignment to an alternative school.[289]

Kansas required the suspension or revocation of the driver's license and driving privileges of pupils who receive an extended suspension or expulsion.[290]

Louisiana required city and parish school boards to adopt student codes of conduct.[291] Next, Louisiana mandated that students and parents sign statements of compliance at the beginning of a school year, committing to attend, arrive on time, demonstrate effort toward completing homework assignments, follow school and class rules (students), and attend conferences (parents).[292] Finally, Louisiana required copies of school discipline codes be distributed at the beginning of each academic year and required boards to review their discipline policies annually.[293]

Maine directed the Education Commissioner to develop statewide standards for responsible and ethical student behavior, with local school units having to adopt student codes of conduct consistent with statewide standards. Units must also report violent and harmful behavior by or against students to the DOE.[294]

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[284] 1999 Tenn. Pub. Acts 129.
[285] 1999 Tex. Sess. Law Serv. 217 (Vernon).
[286] 1999 Ark Acts 1301.
[287] 1999 Ark. Acts 1281.
[288] 1999 Ga. Laws (H.B.) 605, No. 4, sub. 1A.
[289] 1999 Ga. Laws (H.B.) 84, No. 3.
[290] 1999 Kan. Sess. Laws 38.
[291] 1999 La. Sess. Law Serv. 969 (West).
[292] 1999 La. Sess. Law Serv. 1004 (West).
[293] 1999 La. Sess. Law Serv. 1086, sec. 2 (West).

Michigan permitted teachers to suspend students from class for one day for violations of local discipline policies. Under the law, a student may not return to the class without the concurrence of the teacher and the principal.[295]

Ohio exempted asthma inhalers from school disciplinary codes.[296]

Oklahoma permitted local school boards to adopt dress codes including a school uniform policy; however, any rule must have a reasonable connection with an educational function and may not censure political opinions of students or unreasonably interfere with common clothing fads.[297] Oklahoma also passed legislation calling for tougher discipline in public schools and granting immunity for actions taken in good faith in providing more rigid discipline.[298]

Backing away from "zero-tolerance," Virginia gave administrators discretion in determining that special circumstances exist to warrant substitution of another or no consequence for possession of weapons at school[299] and for possession of drugs.[300]

Three states legislated against laser pointers. Arkansas made it unlawful to sell hand-held laser pointers to persons less than eighteen years of age, punishable by a $100 fine[301] and prohibited the possession of the instruments by minors.[302] Rhode Island prohibited laser pointing devices in schools,[303] while Virginia authorized boards to regulate the use of laser pointers in schools.[304]

Six states added provisions about alternative schools. Illinois permitted regional superintendents or local school districts to contract with third parties for alternative educational services and to apply for waivers or modifications of mandates within the school code or administrative rules.[305]

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[294] 1999 Me. Legis. Serv. 351.
[295] 1999 Mich. Legis. Serv. 103.
[296] 1999 Ohio Legis. Serv. 1978 (Baldwin).
[297] 1999 Okla. Sess. Laws 320, sec. 34.
[298] 1999 Okla. Sess. Laws 112.
[299] 1999 Va. Acts 1027.
[300] 1999 Va. Acts 732.
[301] 1999 Ark. Acts 382.
[302] 1999 Ark. Acts 1408.
[303] 1999 R. I. Pub. Laws 486.
[304] 1999 Va. Acts 432.
[305] 1999 Ill. Legis. Serv. 91-318 (West).

Michigan required parents of expelled students to find alternative programs within which to enroll their children.[306] North Dakota funded the establishment and maintenance of alternative education programs; however, the funds may not be used for building construction or renovation.[307] Oklahoma required the creation of middle school alternative programs in all districts and elementary school alternative schools in districts with more than 30,000 students.[308] South Carolina encouraged districts to establish alternative school programs.[309] Virginia established five regional alternative school programs to provide interim instruction, intervention, and supervision for suspended or expelled students, for pupils under court orders, or for students enrolled there by their parents.[310]

Four states addressed the authority of school officials to expel students when they commit criminal acts. Michigan authorized the permanent expulsion of students sixth grade and above who assault school employees, volunteers, or contractors at school and required 180-day expulsions of pupils who commit verbal assault, including making bomb threats.[311] Missouri prohibited non-disabled students who are adjudicated as having committed an act that would be a felony if committed by an adult from attending a regular program; even so, a local school district may provide services in an alternative setting.[312] Ohio permitted superintendents to expel students for one year for bringing firearms to interscholastic or extracurricular events; the law also required superintendents to notify juvenile judges of the expulsions.[313] Texas permitted schools to expel students who assault school employees on school grounds, at school-related activities, or as a result of a person's employment or association with the school, regardless of where the assault occurs.[314]

Three states addressed concerns about students being able to thwart expulsion by transferring to other schools. Illinois required parents of students who are transferring into a school to certify that their child is not currently under a disciplinary exclusion. If students transferring in have been placed, suspended, or expelled for battery on a staff member or possession of a controlled substance, school boards are authorized to place students in alternative settings.[315] Maine required local school units to transfer records to follow students who transfer from one unit to another; under this act, when asked, sending school units must provide information about disciplinary exclusions to receiving units.[316] The receiving unit may deny admission until a student's terms of exclusion have been met. Tennessee placed a duty on parents to notify principals, when enrolling their child, if the child is under a disciplinary exclusion elsewhere or has been an adjudicated delinquent for listed felonies such as murder, rape, or robbery.[317] Confidentiality is required, but the principal is authorized to share the information with employees providing direct classroom instruction.

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[306] 1999 Mich. Legis. Serv. 23.
[307] 1999 N. D. Laws H. B. 1196.
[308] 1999 Okla. Sess. Laws 320, sec. 49.
[309] 1999 S. C. Acts 107.
[310] 1999 Va. Acts 440.
[311] 1999 Mich. Legis. Serv. 104.
[312] 1999 Mo. Legis. Serv. 168, sec. A (Vernon).
[313] 1999 Ohio Legis. Serv. 124 (Baldwin).
[314] 1999 Tex. Sess. Law Serv. 542. (Vernon).

Colorado demonstrated sensitivity to victims of violence when it prohibited school districts from permitting students who have been expelled for committing a violent act against another to be re-enrolled at the same school attended by victims or their family members.[318] If a school must re-enroll a student, the district must make attempts to minimize contact between the perpetrator and the victim.

The following states addressed school safety by attempting to assure that school employees who abuse children or perpetrate other misconduct are tracked or lose their licensure.

California directed its Commission on Teacher Credentialing to revoke the credentials of any teacher who is convicted of encouraging or contributing to the delinquency of persons less than age eighteen when it involves lewd and lascivious conduct.[319]

Minnesota required teacher certification authorities to refuse to issue, renew, or automatically revoke without a hearing the certificates of teachers convicted of child abuse.[320] Local school boards then must immediately dismiss teachers who lose their certification under this provision.

New Jersey directed local boards of education to notify the State Board of Examiners whenever non-tenured certified employees are dismissed during a school year for misconduct in office. This act also requires the State Board of Examiners to retain a listing of names, social security numbers, and reasons for dismissal.[321]

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[315] 1999 Ill. Legis. Serv. 91-365 (West).
[316] 1999 Me. Legis. Serv. 351.
[317] 1999 Tenn. Pub. Acts 462.
[318] 1999 Colo. Sess. Laws 134.
[319] 1999 Cal. Stat. 710.
[320] 1999 Minn. Sess. Law Serv. 201 (West).
[321] 1999 N. J. Laws 301.

North Dakota required the denial or immediate revocation of teaching certificates of teachers or school administrators found guilty of crimes against children or sexual offenses.[322]

Tennessee directed local superintendents to notify the Commissioner of Education when teachers are dismissed after a conviction of felony so that the Commissioner may begin licensure revocation proceedings.[323]

One other means of providing additional safety for students was through legislation about transportation. The Alaska legislature addressed several aspects of school bus safety. Alaska school districts are required to instruct students about safe boarding, riding, exiting, and emergency procedures related to school buses. Under this legislation, districts must instruct drivers and passengers on the safe use of seat belts where they exist and conduct at least three school bus safety drills each school year. Additionally, the State DOE is required to establish equipment regulations, maintain records of accidents, and inspect buses twice a year.[324]

Arkansas made passing a stopped school bus that is receiving or discharging passengers a Class A misdemeanor.[325]

California directed the Department of Transportation to establish and administer a "Safe Routes to School" construction program using federal transportation funds for construction of bicycle and pedestrian safety routes.[326] In addition, California required school bus safety instruction, including the use of seat belts, at least once per year.[327]

Florida directed that all school buses purchased after December 31, 2000, must be equipped with safety belts.[328]

Illinois added to the duties of Parent-Teacher Advisory Committees, requiring them to develop policy guidelines and procedures to establish and maintain school bus safety procedures with school boards and in cooperation with school bus personnel, to be incorporated into pupil discipline policies.[329] Illinois required drivers to stop before meeting or overtaking a stopped school bus on a roadway on school property, not just on highways.[330] Illinois also required strobe lights on school buses and reflective tape on the sides of school buses to identify emergency exits.[331] Finally,

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[322] 1999 N. D. Laws S. B. 2074.

[323] 1999 Tenn. Pub. Acts 43.

[324] 1999 Alaska Sess. Laws 51 (H.B. 216).

[325] 1999 Ark. Acts 1516.

[326] 1999 Cal. Stat. 663.

[327] 1999 Cal. Stat. 647.

[328] 1999 Fla. Sess. Law Serv. 316 (West).

[329] 1999 Ill. Legis. Serv. 91-272 (West).

[330] 1999 Ill. Legis. Serv. 91-260 (West).

[331] Ill. Legis. Serv. 91-168 (West). Ill. Legis. Serv. 91-697 (West).

Illinois required the cancellation of a school bus driver's permit for only a trace of alcohol on a driver's blood test,[332] while applicants for bus driver permits cannot have had their commercial drivers' licenses disqualified within the prior three years.[333]

Louisiana directed the State Board of Elementary and Secondary Education to adopt rules requiring occupant restraint systems in every bus by June 30, 2004.[334]

Minnesota required training on the use of seat belts in buses for pupils K-10.[335]

New York required the exterior of school buses to be marked with reflective material[336] and running lights to be illuminated at all times.[337] Oklahoma also ordered that school bus headlights be used at all times.[338]

Rhode Island required school buses to carry signs indicating that it is unlawful to pass when red lights are flashing.[339]

Texas gave local school districts the discretion to decide conditions under which rooftop warning lamps must be lit on school buses.[340]

Students with Disabilities

This section describes legislation passed by the states related to students with disabilities.

A few states made technical amendments to their special education statutes to make them conform with changes in federal law.[341] Other provisions related to students with disabilities are described below.

California authorized a certificate of educational achievement award to individuals with exceptional needs who meet certain criteria but do not qualify for a diplomas.[342] Students with exceptional needs who meet the criteria for a certificate of educational achievement must be permitted to participate in graduation ceremonies or other school activities related to graduation in which pupils of a similar age without disabilities would be eligible to participate.

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[332] Ill. Legis. Serv. 91-124 (West).

[333] Ill. Legis. Serv. 91-500 (West).

[334] 1999 La. Sess. Law Serv. 998 (West).

[335] 1999 Minn. Sess. Law Serv. 241, sec. 22, subd. 2 (West).

[336] 1999 N. Y. Laws 525.

[337] 1999 N. Y. Laws 95.

[338] 1999 Okla. Sess. Laws 189, sec. 4.

[339] 1999 R. I. Pub. Laws 454.

[340] 1999 Tex. Sess. Law Serv. 183 (Vernon).

[341] 1999 Me. Legis. Serv.424. 1999 Miss. Laws 582. 1999 N. Y. Laws 311.

[342] 1999 Cal. Stat. 392.

Connecticut required local boards to take responsibility for vocational-technical programs for students with disabilities if a planning and placement team determines that a pupil cannot be served appropriately at a regional vocational-technical school.[343]

Louisiana provided for an alternative assessment to statewide criterion-referenced tests for students with disabilities who meet criteria established by its State DOE.[344] IEP teams must evaluate whether an individual student meets the criteria for alternative assessment.

Maine acted to provide that mediators are considered state employees who are entitled to immunity under the Maine Tort Claims Act.[345]

Montana required local districts to send the Superintendent of Public Instruction copies of each new or amended individual transportation contract.[346]

Nevada addressed the use of aversive intervention, physical restraint, and mechanical restraint on pupils with disabilities, defined the conditions under which each may be used, and directed the State DOE to develop and deliver a mandatory training program for staff.[347]

New Hampshire changed the age range for the identification of developmentally delayed children from three to five years of age to three to nine years of age.[348] New Hampshire also authorized school districts to spend funds for catastrophic special education costs with the potential for reimbursement from the state.[349]

North Dakota authorized the Superintendent of Public Instruction to enforce findings of IDEA complaints by withholding state special education funds from school districts.[350]

Virginia protected instructional employees, aides, and clerical employees from discipline for refusing to perform non-emergency health-related services for students unless they are hired specifically to do so.[351]

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[343] 1999 Conn. Legis. Serv. 281 (West).

[344] 1999 La. Sess. Law Serv. 407 (West).

[345] 1999 Me. Legis. Serv.424.

[346] 1999 Mont. Laws 51.

[347] 1999 Nev. Stat. 597, sec. 24. Illinois placed restrictions on time-out and physical restraint. *See* n. 166, *supra*.

[348] 1999 N. H. Laws 107.

[349] 1999 N. H. Laws 341.

[350] 1999 N. D. Laws S. B. 2154.

[351] 1999 Va. Acts 757.

Technology

This section describes the approaches taken by the states to integrate technology into instructional programs. Six states passed legislation regarding governance over technology program development. Arkansas consolidated all educational technology functions within its State DOE.[352] Arkansas also replaced the Public School System Computer Network Advisory Council with the newly-created Public Education Technology Advisory Board.[353] California established the Commission on Technology in Learning to make policy recommendations about statewide planning for educational technology to the State Board of Education.[354] Idaho required its State Board of Education to create a Higher Education Information Technology Committee to advise the State Council for Technology in Learning with respect to post-secondary and other technological and telecommunications issues affecting education, not including primary and secondary schools.[355] Further, the State Board of Education must create a subcommittee of the State Council for Technology in Learning, to be known as the Public Information Technology Committee to address technological and telecommunications issues in primary and secondary schools.[356] Minnesota required local governmental entities to purchase telecommunications services exclusively through a newly-created state government telecommunications pricing plan.[357] Mississippi created a center for advanced technology partnership, to be administered by two community college districts.[358] Oklahoma passed the Virtual Internet School in Oklahoma Network (VISION) Act, a pilot program for the development of a virtual Internet school to provide Web-based instruction.[359]

Four states addressed needs related to infrastructure. Arkansas appropriated $4 million for a distanced education technology center at Petit Jean College.[360] Indiana required each school corporation to establish a technology fund from which expenditures must be made for technology purposes.[361] Despite the existence of the technology fund, capital project fund moneys can be used for wiring, computer networks, and communication systems. In addition, the legislation requires updating a school technology plan every three years as well as an annual report to the Superintendent of Public Instruction. North Dakota created a new Information Technology Department, which is charged with creating and operating a wide area network (WAN) to be used by all state agencies, higher education institutions, counties, cities, and school districts.[362] Virginia created a grants program and trust fund for technology infrastructure, software and hardware acquisition and replacement, and innovative programs to advance the effectiveness of educational technology.[363]

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[352] 1999 Ark. Acts 148.
[353] 1999 Ark. Acts 98.
[354] 1999 Cal. Stat. 830.
[355] 1999 Idaho Sess. Laws 327, sec. 6.
[356] 1999 Idaho Sess. Laws 327, sec. 7.
[357] 1999 Minn. Sess. Law Serv. 228 (West).
[358] 1999 Miss. Laws 576.
[359] 1999 Okla. Sess. Laws 225.
[360] 1999 Ark. Acts 369.
[361] 1999 Ind. Acts 619.

Five states passed legislation related to training personnel in technology. Arkansas established the Arkansas Technical Careers Student Loan Forgiveness Program to provide an incentive for students to pursue training in technology.[364] Colorado established the Institute for Telecommunications Education at the University of Colorado.[365] The institute will provide interdisciplinary education related to telecommunications and information technology, operate as an interface between universities and education markets, and broker educational services to student markets. Florida authorized inter-institutional articulation agreements to improve the preparation of elementary, middle, and high school teachers and encourage professional development in the use of new technology.[366] Nebraska funded educational technology training for educators to teach them to infuse technological resources and software applications into the curriculum.[367] Virginia required the State Board of Education to include a teaching licensure for technology by 2003.[368]

Three states mandated the existence of acceptable use policies for access to the Internet. Louisiana directed every local school board to adopt an acceptable use policy for access by students and employees to the Internet and online sites.[369] An acceptable use policy may take into account the use of filtering devices, but must make provision for access for legitimate scientific and educational purposes. South Dakota directed local school boards to develop policies related to the acceptable use of computers and to limit the access of minors to obscene materials.[370] Virginia required local superintendents to file acceptable use Internet policies with the Superintendent of Public Instruction.[371]

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[362] 1999 N. D. Laws S. B. 2043.
[363] 1999 Va. Acts 870.
[364] 1999 Ark. Acts 652.
[365] 1999 Colo. Sess. Laws 244.
[366] 1999 Fla. Sess. Law Serv. 150 (West).
[367] 1999 Neb. Laws 386.
[368] 1999 Va. Acts 1035.
[369] 1999 La. Sess. Law Serv. 1014 (West).
[370] 1999 S. D. Laws H. B. 1186.
[371] 1999 Va. Acts 64.

The remaining 1999 legislation about technology designated specific uses of technology. These uses are described as follows. California required every source of printed instructional materials to provide, at no cost, unencrypted electronic versions of the materials.[372] Next, California required state agencies, including education, to make a listing of all grants that they administer, along with information pertinent to making grant applications available on the Internet.[373] Finally, California required notice of regular meetings of state bodies be made available on the Internet.[374]

Hawaii directed its DOE, through the with the University of Hawaii, to provide email accounts at no charge to any student in ninth grade through graduate school who applies to the DOE for an account.[375]

Indiana required state agencies to provide electronic access to notices of public meetings and electronic invitations to bid on contracts for public works and supplies.[376]

Ohio added electronic textbooks to the list of instructional materials that a school board must furnish free of charge.[377]

Oklahoma required its State Board of Education to post criterion-referenced sample tests on the Internet for each grade level and subject matter tested under the state testing program.[378]

Oklahoma created a grant program to establish Internet homework tutoring chat rooms and a school testing assistance Website.[379]

Virginia required its State Board of Education to purchase interactive educational software and other instructional materials designed as tutorials to improve achievement on statewide assessments.[380] Additionally, Virginia permitted public bodies to use electronic notices for public meetings.[381] Finally, Virginia directed the State Council on Higher Education to establish in-service technology training sites for educational personnel.[382]

Training Programs

In 1999, legislatures passed laws to address training needs for preservice and in-service teachers, shortages in certified personnel, and alternative paths to certification. States continued to show support for master teacher certificates offered by the National Board of Professional Teaching Standards (NBPTS). A new topic was induction and mentoring programs for beginning teachers. This section describes the training programs legislated by the states last year.

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[372] 1999 Cal. Stat. 379.
[373] 1999 Cal. Stat. 405.
[374] 1999 Cal. Stat. 393.
[375] 1999 Haw. Sess. Laws 178.
[376] 1999 Ind. Acts 204.
[377] 1999 Ohio Legis. Serv. 200 (Baldwin).
[378] 1999 Okla. Sess. Laws. 356.
[379] 1999 Okla. Sess. Laws 159.
[380] 1999 Va. Acts 680.
[381] 1999 Va. Acts 696.
[382] 1999 Va. Acts 562.

Three states legislated changes in pre-service teacher training in colleges and universities. California required its Teacher Credentialing Commission to ensure that by July 1, 2002, accredited teacher-training programs satisfy standards established by the commission.[383] The standards must be based on independent job analyses of the essential knowledge, skills, and abilities needed by all classroom teachers to develop English language skills while maintaining academic progress.[384] Colorado created a performance-based teacher education program review process that sets standards for teacher education programs.[385] Among the standards are requirements for an 800-hour field-based student teaching experience and collection of data on program quality. Oklahoma required pre-service programs for teachers to include in existing coursework the study of substance abuse symptoms identification and prevention, classroom management skills, and classroom safety and discipline techniques. [386]

Five states supported NBPTS certification through incentive funding. Arkansas encouraged teachers to participate in and complete NBPTS certification and authorized the DOE to pay full tuition and incentive bonuses of $2,000 per year.[387] Illinois awarded NBPTS-certified master teachers $3,000 per year, with another $1,000 stipend for mentoring other teachers. The stipend increases to $3,000 for mentoring others in locations where more than 50% of students are eligible for free and reduced lunch.[388] Iowa encouraged NBPTS certification by paying half the cost of application and offering annual awards of $2,500 to $5,000 for obtaining certification.[389] Mississippi provided $500 for the application process and $6,000 annual salary supplements for teachers receiving NBPTS certification.[390] Counselors and speech therapists receiving national certification in their fields qualify for the same supplements. Oklahoma increased the incentive stipend for NBPTS certification from $5,000 to $7,000 per year.[391]

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[383] 1999 Cal. Stat. 711.

[384] *Id.*

[385] 1999 Colo. Sess. Laws 292.

[386] 1999 Okla. Sess. Laws 202.

[387] 1999 Ark. Acts 58.

[388] 1999 Ill. Legis. Serv. 91-606 (West).

[389] 1999 Iowa Legis. Serv. 150 (West).

[390] 1999 Miss. Laws 569.

[391] 1999 Okla. Sess. Laws 320. 1999 Okla. Sess. Laws 46.

Six states addressed teacher in-service and staff development. Arizona amended a provision requiring certified teachers to participate in a forty-five clock-hour (or three college-level credit hours) training program in research-based phonics instruction, so that teachers holding certificates on June 30, 1999, are now exempt from the training requirement.[392] Connecticut directed its DOE to convene a panel of teachers, administrators, reading researchers, early childhood specialists, and higher education experts to create an institute for professional development.[393] Teachers in Georgia who remove two or more misbehaving students in a year who are later returned to class by a placement review committee must complete a professional development plan to improve their classroom management skills.[394] Minnesota required teachers who are renewing their certificates to obtain professional development in the use of positive behavior interventions and in accommodating, modifying, and adapting curricular materials and strategies to meet the needs of individuals and ensure adequate progress toward graduation.[395] In order to encourage staff development, Virginia gave licensed teachers an income tax deduction for 20% of the costs of continuing education.[396] Washington directed the Office of the Superintendent of Public Instruction to conduct a series of professional development institutes to help teams from school districts learn how to deal effectively with disruptive students.[397]

Two states mandated induction programs for new teachers. Iowa directed its State DOE to coordinate a beginning teacher induction program to promote excellence in teaching, build a supportive environment within the school district, increase the retention of promising beginning teachers, and promote the personal and professional well-being of teachers.[398] Area agencies are required to develop model plans for the induction programs and appoint district facilitators to administer the plans. Tennessee required that probationary teachers (now designated apprentice teachers) work for three school years under the supervision of two tenured teachers who are assigned by their principal.[399]

Three states acted to support mentoring programs. California replaced its Mentor Teacher Program with the Peer Assistance & Review Program for Teachers, effective July 1, 2001.[400] A local governing board and the exclusive bargaining agent for a district's certified employees are charged with implementing the new program. Mississippi authorized mentoring programs for beginning teachers.[401] Texas supplied a $5,000 year-end stipend for certified master reading teachers who mentor other teachers to improve student reading skills.[402]

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[392] 1999 Ariz. Sess. Laws, Ch. 256, sec. 4.
[393] 1999 Conn. Legis. Serv. 227 (West).
[394] 1999 Ga. Laws (H.B.) 605, No. 3.
[395] 1999 Minn. Sess. Law Serv. 241, sec. 7, subd. 4(k) (West).
[396] 1999 Va. Acts 285.
[397] 1999 Wash. Legis. Serv. 166 (West).
[398] 1999 Iowa Legis. Serv. 173.
[399] 1999 Tenn. Pub. Acts 12.
[400] 1999 Cal. Stat. 4.

Five states passed legislation related to training of paraprofessionals, in some cases designed to assist them in becoming certified teachers. Arkansas gave classified employees and volunteers a role in providing discipline for students; however, they must first receive training in appropriate student discipline techniques.[403] Louisiana established a continuing education program, including tuition payments, to help school support personnel obtain teacher certification.[404] Companion legislation provides a stipend to replace lost pay for participating in the program.[405] Oklahoma required its State Board of Education to adopt a career development program for paraprofessional school employees.[406] Rhode Island required the creation, development, and delivery of professional development plans for teachers' assistants.[407] Virginia provided scholarship funds to assist paraprofessionals to become teachers.[408]

In large part, legislation supporting the development of paraprofessionals into certified classroom teachers was aimed at addressing shortages in qualified instructional staff. Three states used other means to address shortages. Arkansas required each state-supported institution of higher education to report the name, address, and college major of every minority student completing requirements for licensure as a school teacher to the DOE.[409] California required its Teacher Credentialing Commission to report annually to the Legislature and Governor on the number of classroom teachers who received credentials, internships, and emergency permits in the previous fiscal year, and to provide this information to local and county school agencies to assist in recruitment.[410] California also demanded that 60% of the funding awards for teacher training go to applicants who agree to teach in subject areas experiencing a shortage of certified teachers, or in rural areas.[411] A third California initiative was to expand the program for assuming student loans to include teachers who agree to teach in districts with a high percentage of teachers who have emergency teaching credentials.[412] Maryland attempted to remedy teacher shortages by providing stipends, signing bonuses, and tuition tax credits.[413]

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[401] 1999 Miss. Laws 430.

[402] 1999 Tex. Sess. Law Serv. 931 (Vernon).

[403] 1999 Ark. Acts 1475.

[404] 1999 La. Sess. Law Serv. 807 (West).

[405] 1999 La. Sess. Law Serv. 580 (West).

[406] 1999 Okla. Sess. Laws 295.

[407] 1999 R. I. Pub. Laws 362.

[408] 1999 Va. Acts 753.

[409] 1999 Ark. Acts 905.

[410] 1999 Cal. Stat. 381.

[411] 1999 Cal. Stat. 650.

Eight states created alternative pathways into the fields of teaching and administration. The remaining items in this section list alternative certification programs authorized by legislative acts.

California required its Teacher Credentialing Commission, on the request of a local school board, to issue a professional teaching credential to any person who demonstrates knowledge and expertise in a subject area by completing a graduate degree in the subject.[414] Colorado empowered local districts to initiate teacher-in-residence programs to provide vehicles for alternative teacher certification. Under this program, teachers-in-residence would have two years to complete coursework for certification under the tutelage of the principal and a licensed mentor teacher.[415] Illinois removed the population size requirement for districts to participate in the four-year alternative teacher certification program.[416] Previously, only districts with a minimum population of 500,000 persons could participate. Louisiana established the Distinguished Educators Program to identify professionals who, by their education and experience, are qualified to work with low-performing schools.[417] Distinguished Educators will be hired by the State DOE for project positions on a per-project basis. Noteworthy is the provision that Distinguished Educators may come from fields other than education. Maine directed local school units to provide support services, assistance, and performance review to teachers who are teaching under a certification waiver.[418]

Missouri established the Missouri Teacher Corps program to provide an alternative certification path for fifty college seniors not majoring in education.[419] Participants will take an eight-week intensive training program, then contract to teach in target districts at regular teacher pay. While teaching, participants will complete a Master of Arts in Teaching program with tuition provided by the state. North Carolina permitted assistant principals to receive provisional certification for one year if they enroll in a masters program in school administration and there is a shortage of persons with administrative certification.[420] North Carolina also permitted the use of provisional certification in teaching areas with shortages of certified individuals for educators with one year of college teaching experience or persons with three years of experience of any kind that the board believes is relevant to the grade or subject area.[421] Texas permitted past members of the armed forces with baccalaureate or advanced degrees to teach without certificates; these individuals must take coursework for certificates in the time frame specified by the state education agency.[422]

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[412] 1999 Cal. Stat. 651.
[413] 1999 Md. Laws 600.
[414] 1999 Cal. Stat. 737.
[415] 1999 Colo. Sess. Laws 292.
[416] 1999 Ill. Legis. Serv. 91-609 (West).
[417] 1999 La. Sess. Law Serv. 409, sec. 1 (West).
[418] 1999 Me. Legis. Serv. 238.
[419] 1999 Mo. Legis. Serv. 168, sec. A, 6 (Vernon).

Higher Education

Compared to legislation for K-12 schools, legislation related to higher education was relatively meager. This section summarizes higher education-related legislation within the states.

Two states provided direction aimed at developing more efficiency and cooperation between institutions of higher education. In response to constitutional tax and fee limits passed in 1992,[423] the Colorado legislature directed the Department of Higher Education to study the performance and organization of the state higher education system.[424] The study will require the Department to identify duplication of administrative oversight, reporting, curriculum, and personnel management. Also, the study will compare budget information, distance learning applications, distribution of graduate education, and the role and mission of each institution. Florida passed legislation fostering cooperation between community colleges and universities to provide baccalaureate degrees to place-bound nontraditional students.[425]

Four states directed their attention to tuition charges. The California Legislature required the University of California and California State University systems to decrease education and registration fees by 5%.[426] Illinois required a statement of subsidy explaining the portion of tuition provided by the General Assembly to be included with each state student's tuition bill.[427] Maine provided tuition waivers for up to five years at state postsecondary educational institutions for persons who have resided in foster care.[428] Virginia required all institutions of higher education to reduce tuition and fees by 20% for the 1999-2000 school year.[429]

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[420] 1999 N. C. Adv. Legis. Serv. 30, no. 1.
[421] 1999 N. C. Adv. Legis. Serv. 108, no. 1.
[422] 1999 Tex. Sess. Law Serv. 396 (Vernon).
[423] COLO. CONST. sec. 20, art. X.
[424] 1999 Colo. Sess. Laws 197.
[425] 1999 Fla. Sess. Law Serv. 290.
[426] 1999 Cal. Stat. 72.
[427] Ill. Legis. Serv. 91-185 (West).

Three states provided direction concerning authority in employment contracts. Arkansas attempted to provide more flexibility in hiring decisions for institutions of higher education by granting the Legislative Council the authority to create new and additional faculty and staff positions.[430] Colorado amended an existing statute[431] already allowing governing boards of higher education to delegate personnel matters to their chief executive officers, who can then further delegate authority to other university officials the hiring and firing of employees who are exempt from the state personnel system.[432] Texas restricted contracts of university administrators to three years and prohibited them from returning to faculty status and making more than the prevailing faculty pay.[433]

Four states passed special provisions related to the business functions of colleges and universities. Colorado passed two provisions permitting the State Board of Agriculture and the Colorado School of Mines to lease property to fraternities and sororities.[434] Illinois permitted any county to appropriate money to a nonprofit corporation for purchasing land or buildings for a county university center.[435] Illinois also required the scholarship money generated from the sale of collegiate license plates to be placed in separate accounts within a trust fund for each college or university for which the plates were issued, for distribution directly to the school.[436] Louisiana limited advertising by colleges and universities to 5% of their operating budgets or $100,000, whichever is less.[437] Further, Louisiana required competitive bids before colleges and universities could lease grounds to private entities.[438] South Carolina permitted institutions of higher education to spend funds for award programs for faculty staff, students, and distinguished guests, but the money could only come from revenues from athletic contests, student organization activities, canteen and bookstore operations, and private practice plans.[439]

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[428] 1999 Me. Legis. Serv. 216.

[429] 1999 Va. Acts 1042.

[430] 1999 Ark. Acts 664.

[431] COLO. REV. STAT. 23-5-117.

[432] 1999 Colo. Sess. Laws 76.

[433] 1999 Tex. Sess. Law Serv. 533 (Vernon).

[434] 1999 Colo. Sess. Laws 249. 1999 Colo. Sess. Laws 67.

[435] 1999 Ill. Legis. Serv. 91-398 (West).

[436] 1999 Ill. Legis. Serv. 91-83 (West).

[437] 1999 La. Sess. Law Serv. 710 (West).

[438] 1999 La. Sess. Law Serv. 167 (West).

[439] 1999 S. C. Acts 70.

Faculty and student rights were also addressed through legislation. Arizona passed legislation prohibiting universities and community colleges that assign identification numbers to faculty, staff, or students from using social security numbers for identification unless an individual requests that his or her social security number be so used.[440] Institutions are, in addition, prohibited from displaying any four or more consecutive numbers from a social security number on any Internet site maintained by the institution.

California authorized institutions of higher education to provide faculty members with access to peer review materials in a form that preserves the anonymity of the reviewer and exempted such materials from a pre-existing requirement that adverse materials be removed from an employee's personnel file. This provision was not to become operational unless another bill[441] was chaptered and became operational. The other bill did not become operational.[442]

Colorado amended an existing section requiring an "advising system that is responsive to students"[443] within the Higher Education Quality Assurance Act.[444] The Quality Assurance Act specifies that first-year and transfer students receive orientation, that advisors must provide data about potential employment opportunities, and that advisory records be maintained. The act further requires the integration of classroom experiences with real-world experiences and that institutions of higher education show improvement of student achievement, as measured by such factors as retention, graduation, and job placement rates.

Florida directed its State Board of Community Colleges to develop and produce work products designed to promote distance learning and provide a contract to determine ownership of intellectual property represented in the work products.[445]

The remaining items in this section list other acts related to higher education. Arkansas specified that noncredit remedial courses taken at state-supported institutions of higher education may be included within the meaning of "public school purposes."[446] Arkansas also required colleges to advise students and parents of the increased risk of meningococcal disease to those who live in dormitories and to make them aware of the availability of a vaccine against the risk.[447] Arkansas also restricted credit card solicitation on college campuses.[448]

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[440] 1999 Ariz. Sess. Laws., ch. 239, sec. 1.
[441] 1999 Cal. Adv. Legis. Serv. S.B. 172 (Deering).
[442] 1999 Cal. Stat. 878.
[443] COLO. STAT. 23-13-102 through 23-13-105.
[444] 1999 Colo. Sess. Laws 296.
[445] 1999 Fla. Sess. Law Serv. 249 (West). 1999 Fla. Sess. Law Serv. 354 (West).
[446] 1999 Ark. Acts 375.
[447] 1999 Ark. Acts 1233.

California required its Postsecondary Education Commission to develop a comprehensive database that supports longitudinal studies of individual students, provides interactive use of data, and is available to educational agencies.[449] Further, California increased the number of student members of the Trustees of California State University to two.[450]

Louisiana prohibited the dissemination of credit card information during university and college registrations.[451]

Mississippi established a Regional Initiatives Program within the University Research Center to provide financial assistance to counties and to other economic development activities.[452]

New Hampshire increased the number of student trustees on the University of New Hampshire board from one to two.[453]

New York required the State University of New York to adopt rules regarding the investigation of violent felony offenses and the investigation and reporting of any missing students.[454]

Pennsylvania provided for treble damages for persons who obtain higher education grants through fraudulent means.[455]

Texas required the Higher Education Coordinating Board to develop and annually update a uniform strategy to identify, attract, retain, and enroll students who reflect the population of the state.[456] Additionally, Texas permitted the use of debit cards to purchase merchandise or services at private or independent colleges and universities.[457]

Conclusion

The 1999 legislative sessions saw a marked increase in the amount of statutes related to education compared to prior years. Concerns about school quality, school safety, program offerings, and other matters induced state legislators to raise education-related activity to its highest level in recent history.[458] One might interpret this heightened activity as experiments in addressing issues, problems, and dilemmas in educational policy. Alternately, one might interpret this legislative hyperactivity as sheer political opportunism.

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[448] 1999 Ark. Acts 1328.

[449] 1999 Cal. Stat. 916.

[450] 1999 Cal. Stat. 251.

[451] 1999 La. Sess. Law Serv. 934 (West).

[452] 1999 Miss. Laws 379.

[453] 1999 N. H. Laws 281.

[454] 1999 N. Y. Laws 22

[455] 1999 Pa. Laws 159, no. 22.

[456] 1999 Tex. Sess. Law Serv. 1392 (Vernon).

[457] 1999 Tex. Sess. Law Serv. 370 (Vernon).

By far, school safety was the area in which legislatures were most active, and in many of the enrolled bills, legislative responses broadened what is criminal, provided for multiple criminal counts on the basis of a single action, and increased punishments for criminality. In the shadow of these types of legislation, more enlightened approaches emerged. Interagency cooperation and communication, preparing very young children to be successful in school, measures to stop school failure in the early grades, and an emphasis on character will ultimately do more to make schools safer, or perhaps to convince the public that they are safe.

Accountability was also a dominant feature in last year's legislative season. Each year, individual states adopt more accountability features with an additive effect. Eventually, most states will have comprehensive accountability programs including standard-setting, measuring performance compared to standards, informing the public about performance, remediating to standards, rewarding when standards are met, and intervening when standards are not met.

The legislatures passed more legislation than in prior years in other areas as well. Provision for technology infrastructure, additional curriculum requirements, and targeted programming serve to remind us that education is, after all, experimental, and that legislatures are the laboratories of educational policy.

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[458] For example, these states passed the following numbers of bills related to education: California passed 182 pieces of legislation impacting its education community; Illinois, 49; North Dakota, 78; New York, 20; Arkansas 53; Florida, 26; Louisiana, 39; Oklahoma, 54; Virginia, 81.

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NON-EDUCATION RELATED

David J. Sperry & Scott Ellis Ferrin

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Introduction

This chapter summarizes the 1999 United States Supreme Court non-education cases where neither the plaintiffs nor the defendants were students, teachers, professors, administrators, school districts, or universities. The cases included in this chapter are those which, in the judgement of the authors, have, or could come to have, implications for educators and their attorneys.

Americans with Disabilities Act

In *Albertsons Inc. v. Kirkingburg,*[1] *Sutton v. United Air Lines,*[2] *Murphy v. United Parcel Service,*[3] and *New York State Board of Law Examiners v. Bartlett,*[4] the Court reached decisions that may impact schools in providing accommodations and ameliorating measures to students with special needs or disabilities. In brief, in the first three cases, the Court seems to have defined in a relatively narrow way those who have a disability and who are entitled to reasonable accommodations. For example, in *Sutton*, the Court determined that those with disabilities that can be corrected or alleviated by corrective devices, such as eyeglasses or medication, are no longer regarded as "having a disability." Consequently, if, through the use of corrective devices, individuals are not regarded as having a disability that limits a "major life function," they do not fall under the protection of the Americans with Disabilities Act (ADA)[5] and are not entitled to reasonable accommodations in order to be employed, benefit from a program, or use a public carrier or public accommodation. The Court indicated that having high blood pressure or needing corrective lenses to correct myopia and/or having monocular vision did not qualify a person as having a disability if he or she could overcome the potential disability with reparative glasses or blood pressure medication. The slightly unusual outcome of this narrowing of the definition of disability for ADA purposes suggests that if a condition is correctable or if, for example, an employee's vision is adequate with lenses or if the employee can have safe blood pressure with medication, then he or she can be fired or denied a job as a pilot or truck driver. However, if the condition or disability is not correctable, then an individual may not be denied a job without being offered reasonable accommodations.

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[1] 527 U.S. 555 (1999) (holding that a truck driver with monocular vision was not per se "disabled" within the meaning of the ADA but, rather, had to prove his disability on a by, offering evidence that the extent of the limitation on a major life activity in terms of his own experience was substantial).

[2] 527 U.S. 471 (1999) (finding that severely myopic prospective airline pilots who could see normally with corrective lenses did not have a disability under the ADA).

[3] 527 U.S. 516 (1999) (ruling that a mechanic's high blood pressure was not a disability under the ADA because medication prevented his condition from substantially limiting any major life activity).

[4] 119 S. Ct. 2388 (1999) (mem.).

[5] 42 U.S.C. § 12101 *et seq.*

This narrowing of the definition of disability has implications in dealing with the learning disabilities of students in schools and colleges. In *New York State Board of Bar Examiners v. Bartlett*, a law school graduate who had a doctorate in educational administration charged that the New York Board of Bar Examiners' failure to accommodate her disability during the bar exam violated her rights under the ADA. The plaintiff evidently had or claimed to have a cognitive disorder that impaired her ability to read. The Second Circuit noted:

> Despite her limitation, she has earned a Ph.D. in Educational Administration from New York University, a law degree from Vermont Law School, and has met all prerequisites to sit for the New York State Bar Examination (the bar examination). The defendant-appellant Board is a State entity charged with testing and licensing applicants seeking admission to the New York State Bar. Since 1991, Dr. Bartlett has taken the bar examination five times. On at least three and possibly four separate occasions, she has applied as a reading disabled candidate to take the bar examination with accommodations. Dr. Bartlett has sought unlimited or extended time to take the test, permission to tape record her essays and to circle her multiple choice answers in the test booklet. The Board has denied her request each time, contending that her application does not support a diagnosis of a reading disability or dyslexia. In total, Dr. Bartlett has taken the examination four times without accommodations and has yet to pass. In her complaint, she sought, among . . . other things, injunctive relief in the form of reasonable testing accommodations and compensatory damages for fees paid in connection with past attempts to pass the examination.[6]

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[6] Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 324-325 (2nd Cir. 1998).

The Second Circuit posited that Bartlett's claim had to be evaluated in terms of whether her failure was due to a disability and, thus, may have required reasonable accommodation under the ADA without regard to mitigating measures such as having extra time during an examination. Using that definition, the Second Circuit judged that since Bartlett did have a disability, the Board of Bar Examiners was required to offer her a reasonable accommodation. However, the Supreme Court vacated and remanded *Bartlett* for reconsideration in light of *Albertsons*, *Sutton*, and *Murphy*. As such, it appears that if a mitigating measure such as providing more time to take tests will correct the problem, then a student, or a bar applicant, does not have a right to reasonable accommodation during testing because she or he is not regarded as having a disability.

A dissenting judge in the Sixth Circuit has already commented on this relatively unclear, or unusual, outcome in an unpublished opinion:

> In essence, the magistrate judge concluded that a person does not have a disability for purposes of the ADA if he or she can function adequately with special accommodations not required by the average person in the general population. This accords with no one's understanding of the word "disability," either as the word is used in the ADA or in the English language generally. The Supreme Court, of course, has held that corrective measures, such as eyeglasses and high-blood pressure medication, must be taken into account in determining whether a person has a disability for purposes of the ADA . . . . But I do not believe that the assistance of other human beings in digesting school material could conceivably be considered a "corrective measure" like eyeglasses are for the nearsighted, or high-blood pressure medication for the hypertensive. The question that the magistrate judge should have asked--but did not--was whether Shepler produced evidence from which a reasonable factfinder could conclude that she is significantly restricted in the manner in which she learns as compared to the average person in the general population. I think that the answer to that question is yes. Shepler testified in 1998--six and a half years after she was knocked unconscious by an NOCD patient--that her short-term memory had "improved as far as with training myself, how to train--you know, read something enough and get it embedded, and help with [aides] from school, note takers and things to help, help me with the short term." The import of this answer, I believe,

> is that Shepler in 1998 was still suffering from cognitive problems that required, in order for her to learn, accommodations not required by the average person in the general population. Moreover, one of her treating physicians described her injury as "[not] just a punch in the nose," but something that produced effects that "really changed her life." At the very least, this evidence raises a genuine issue of material fact regarding Shepler's disability.[7]

It is not yet clear how *Albertsons*, *Sutton*, and *Murphy* will be applied in cases involving testing and learning disabilities. It appears that the Court's actions may lighten the load or limit the legal exposure and universe of legal plaintiffs facing educational institutions that are dealing with learning disabilities and students who are seeking accommodations for those disabilities. Even so, the impact of *Bartlett* and, by reference, *Alberstons*, *Sutton*, and *Murphy* on students with learning disabilities requires further judicial elucidation.

Employment

Several 1999 Supreme Court cases provided interpretive clarifications to legislative acts related to employment matters whose coverage extended to public schools and public institutions of higher education. These include cases dealing with Civil Rights Acts and the Employee Retirement Income Security Act of 1974 (ERISA)[8].

The Civil Rights Act of 1991[9] authorizes punitive damages for claims under title VII of the Civil Rights Act of 1964[10] and the ADA in cases where an employer engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual. In *Kolstad v. American Dental Association,*[11] the plaintiff challenged the denial of her request for a jury instruction on punitive damages in her employment discrimination case against the American Dental Association. The Court of Appeals for the District of Columbia affirmed the denial on the basis

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[7] Shepler v. Northwest Ohio Developmental Ctr., 2000 WL 191496 *7 (6th Cir. Ohio) (Gilman, J., dissenting) (internal citations omitted) (refusing to accommodate an employee who worked with mentally retarded adults after she was attacked by a resident in the facility where she worked).

[8] 88 Stat. 832 as amended, 29 U.S.C. § 101 *et seq*

[9] 105 Stat. at 1071.

[10] 42 U.S.C. § 2000 *et seq.*

[11] 527 U.S.C. 526 (1999)

"that a defendant must be shown to have engaged in some 'egregious' misconduct before the jury is permitted to consider a request for punitive damages."[12] The Supreme Court agreed to hear an appeal to resolve a conflict among the circuits.[13] Recognizing that punitive awards under the common law traditionally include an egregious misconduct requirement, the Court nevertheless explained that an employer's conduct need not be egregious to meet the standard required under section 1981 of the 1991 Civil Rights Act. Specifically, the Court declared:

> While egregious misconduct is evidence of the requisite mental state, § 1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for "egregiousness" in the face of congressional silence. On the contrary, the view that § 1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief.[14]

In *Haddle v. Garrison*,[15] the Court was called upon to clarify another employee civil rights damage claim. Michael A. Haddle, an employee with Healthmaster, alleged that named officers of the corporation "conspired to have him fired from his job in retaliation for obeying a federal grand jury subpoena and to deter him from testifying at a federal criminal trial"[16] wherein other officers of the company were being charged with Medicare fraud. Haddle sought redress under the Civil Rights Act of 1871 and 42 U.S.C. § 1985 (2), which proscribes conspiracies to "deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." Insofar as Haddle was an at-will employee, both a federal trial court in Georgia and the Eleventh Circuit dismissed his action on the ground that he lacked a constitutionally protected interest in continued employment. Thus, Haddle could not show a constitutional injury, which was necessary to establish a cause of action under § 1985(2). The United States Supreme Court reversed in observing:

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[12] Kolstad v. American Dental Ass'n, 139 F.3d 958, 965 (D.C. Cir. 1998).

[13] *See* Luciano v. Olsten Corp., 110 F.3d 210, 219-220 (2nd Cir. 1997) (rejecting the contention that punitive damages require a showing of "extraordinarily egregious" conduct).

[14] Kolstad, *supra* note 10 at 2124.

[15] 527 U.S. 121 (1998).

[16] *Id.* at 121.

> We disagree with the Eleventh Circuit's conclusion that petitioner must suffer an injury to a "constitutionally protected property interest" to state a claim for damages under § 1985(2). Nothing in the language or purpose of the proscriptions in the first clause of § 1985(2), nor in its attendant remedial provisions, establishes such a requirement. The gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings. The term "injured in his person or property" defines the harm that the victim may suffer as a result of the conspiracy to intimidate or retaliate. Thus, the fact that employment at will is not "property" for purposes of the Due Process Clause . . . does not mean that loss of at-will employment may not "injur[e] [petitioner] in his person or property" for purposes of § 1985(2).[17]

ERISA was the subject of a class action complaint filed by retired and working employees of Hughes Aircraft Company who alleged that the company violated the statute when it amended its non-bargaining retirement plan. The amended plan provided for an early retirement program and created an additional noncontributory benefit structure for new participants. The facts of the case revealed that Hughes had offered the retirement plan for its employees since 1955 and that, until 1991, had required mandatory contributions from all participating employees. Hughes was obligated to provide additional monies to the program at such levels as to assure adequate fund benefits and compliance with all applicable legal requirements. The plan also gave Hughes the right to suspend its contribution to the plan so long as it would not create a funding deficit under ERISA. In light of joint contributions and investment growth between 1955 and 1986, the plan's assets exceeded the value of accrued benefits by nearly a billion dollars. In 1987, Hughes suspended its contributions and, in 1989, amended the plan. The first change was to create an early retirement program that provided substantial additional retirement benefits to certain eligible active employees. The 1991 amendment provided that new participants could not contribute to the plan and would receive fewer benefits. Those already on the plan could continue to contribute and receive originally promised benefits or opt to be treated as a new participant.

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[17] *Id.* at 121-126.

Charging that the amendments to the retirement plan violated several ERISA provisions, employees unsuccessfully filed suit in a federal trial court in California, which dismissed the case for failure to state a claim. A split Ninth Circuit reversed.[18] The majority essentially concluded that the amendments to the plan violated ERISA. First, it acknowledged that Hughes violated ERISA's prohibition against using employees' vested, nonforfeitable benefits to meet its obligations by depleting the surplus to fund the noncontributory structure. Second, it stated that by benefiting itself at the expense of the plan's surplus, Hughes violated ERISA's anti-inurement prohibition. The majority also believed that members of the contributory structure had a vested interest in the plan's surplus. Collectively, these violations, in the opinion of the court, triggered additional ERISA's fiduciary provisions.

The Supreme Court, in *Hughes Aircraft Co. v. Jacobson*,[19] disagreed on all counts and reversed the judgment of the Ninth Circuit. Specifically, the Court maintained:

> "respondent" vested benefits and anti-inurement claims proceed on the erroneous assumption that they had an interest in the Plan's surplus, which, with respect to the anti-inurement claim, was used exclusively to benefit Hughes. These claims fail because the 1991 amendment did not affect the rights of pre-existing Plan participants, and Hughes did not use the surplus for its own benefit.[20]

The Supreme Court's judgment effectively turned on the distinction between a defined contribution plan and a defined benefit plan. Labeling the Hughes plan as a defined benefit plan, the Court reasoned:

> The structure of a defined benefit plan reflects the risk borne by the employer. Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool. Instead, members have a right to a certain defined level of benefits, known as "accrued benefits" . . . . Since a decline in the value of a plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus—even if it partially attributable to the investment growth of their contributions. Therefore, Hughes could not

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[18] Jacobson v. Hughes Aircraft Co., 105 F.3d 1288 (9th Cir. 1997), amended, 128 F.3d 1305 (9th Cir. 1998).

[19] 525 U.S. 432 (1999).

[20] *Id.* at 438.

> have violated ERISA's vesting requirement by using assets from the surplus attributable to the employees' contributions to fund the noncontributory structure. ERISA's vesting requirement is met "if an employee's rights in his accrued benefits derived from his own contributions are nonforfeitable," assuming that such are not limited to a certain percentage of benefits depending on the employee's years of service. The vesting provision "sets the minimum level of benefits an employee must receive after accruing specified years of service." Otherwise, the "level of benefits" is determined by "the private parties, not the Government." Hence, this provision does not concern items such as return on investment that fall outside the definition of "accrued benefit." Assuming that an employee's minimum accrued benefit is provided, this section is not implicated. Hughes never deprived respondents of their accrued benefits.[21]

The plaintiffs had contended that even if they had no interest in the plan's assets, the 1991 amendment violated ERISA's anti-inurement provision. The salient portion of this provision reads that "the assets of a plan [except as otherwise provided in the statute] shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."[22] On this issue, the Supreme Court asserted:

> As the language makes clear, the section focuses exclusively on whether fund assets were used to pay pension benefits to plan participants, without distinguishing either between benefits for new and old employees under one or more benefit structures of the same plan or between assets that make up a plan's surplus as opposed to those needed to fund the plan's benefits. Respondents do not dispute that Hughes used fund assets for the sole purpose of paying pension benefits to plan participants. Furthermore, at all times, Hughes satisfied its continuing obligation under the provisions of the plan and ERISA to assure that the Plan was adequately funded . . . . The act of amending a pre-existing plan cannot as a matter of law create two *de facto* plans if the obligations

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[21] *Id.* at 440-441 (internal citations omitted).

[22] ERISA § 403(c)(1); 29 U.S.C. § 1103(c)(1).

> (both preamendment and postamendment) continue to draw from the same single, unsegregated pool or fund of assets. ERISA provides an employer broad authority to amend a plan, and nowhere suggests that an amendment creating a new benefit structure also creates a second plan. Because only one plan exists and respondents do not allege that Hughes used any of the assets for a purpose other than to pay its obligations to the Plan's beneficiaries, Hughes could not have violated the anti-inurement provisions under ERISA § 403(c)(1).[23]

Expert Witnesses

In *Kumho Tire Company v. Carmichael*,[24] a case whose facts and judicial history are not critical for the purposes of this work, the Supreme Court was called upon to clarify a federal judge's obligations over the use and admissibility of testimony of expert witnesses in cases involving other than scientific expert testimony. The use of scientific expert testimony had been the subject of a previous Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals*.[25] In *Daubert*, the Court ruled that scientific expert testimony was admissible only if it was both relevant and reliable. The Court further noted that the task of ensuring a reliable and relevant foundation rested with a trial judge, who might utilize any of a number of helpful factors including testing, peer review, error rates, and acceptability in the relevant scientific community[26] in evaluating the reliability of a particular scientific theory or technique. In *Kumho*, the Court contended that *Daubert's* general holding applied not only to testimony based on scientific knowledge but also to testimony based on technical and other specialized knowledge. The Court remarked that a trial judge may consider one or more of the more specific factors mentioned in *Daubert* if doing so would help determine the reliability of the testimony. The Court emphasized the need for flexibility in determining reliability when it declared: "*Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, according to the Court, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination."[27] In light of the common use of non-scientific expert testimony in many education related cases, *Kumho* should help shape the use of expert testimony in administrative hearings as well as judicial proceedings involving school districts and institutions of higher education.

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[23] *Hughes Aircraft, supra* note 21 at 442-443 (internal citations omitted).

[24] 526 U.S. 137 (1999).

[25] 509 U.S. 579 (1993).

[26] *Id.* at 593-594.

[27] *Kumho, supra* note 24 at 141-142.

Fourteenth Amendment–Equal Protection

In *City of Chicago v. Morales*,[28] the Supreme Court struck down Chicago's Gang Congregation Ordinance which prohibits "criminal street gang members" from loitering in a public place, on the basis that it was unconstitutionally vague and an arbitrary limitation on personal liberties. The Ordinance authorized a police officer who views a person or persons he or she reasonably believes to be a gang member loitering in a public place with at least one other person to order those persons to disperse. Under the Ordinance, an individual's failure to disperse could result in arrest. The Court vitiated the Ordinance despite internal limitations created by the Police Department to detail limited ways officers would enforce the law, including criteria for identifying gang members and definitions of limited areas in which the Ordinance would be enforced.

Morales is interesting in light of anti-loitering rules in some public schools with attendant suspension sanctions. For example, in *Wiemerslage v. Maine Township High School District 207*,[29] a student in Illinois who received a three-day suspension for talking with some friends in a no loitering area on property adjacent to the school unsuccessfully challenged the anti-loitering rule as unconstitutionally vague. Whether *Morales* will have an impact on cases such as *Wiemerslage* remains to be seen. *Morales* does not automatically make anti-loitering rules unconstitutional since courts have given schools wide latitude in devising rules related to student safety, in part, perhaps, because no arrests or criminal penalties ensue. As the *Wiemerslage* court pointed out: "given the peculiar issues facing school administrators, a school's disciplinary rules need not be drafted as narrowly or with the same precision as criminal statutes . . . .[30]" Even so, *Morales* may mean that educators should be wary of such rules. If school officials adopt such rules, they should craft them with as much specificity as possible. Moreover, staff should be trained to enforce rules carefully and fairly, while also providing students with adequate notice.

Also implicated under the rubric of Equal Protection are laws dealing with the rights of language minorities. Recent legislative and political activity in this area such as California's Proposition 227 may affect schools and programs in bilingual education. The current political climate in several states over the establishment of English-only statutes makes this an area that bears watching. Recently, in *Sandoval v. L.N. Hagan*,[31] the Eleventh Circuit struck down an Alabama policy of administering driver's license examinations only in English. *Sandoval* implicates Equal Protection issues even though the Eleventh Circuit based its judgment on statutory grounds and did not actually reach the Fourteenth Amendment issues argued at trial. In the 1970s, Alabama, like many other states, offered accommodations for speakers of several languages in the written portion of the driver's license exam. However, on July 13, 1990, an English-only Amendment to the Alabama Constitution, known as "Amendment 509," was ratified. The Amendment read:

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[28] 527 U.S. 41 (1999).

[29] 29 F.3d 1149 (7th Cir. 1994).

[30] *Id.* at 1151.

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama. Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment.[32]

Pursuant to this amendment, the state's Department of Public Safety adopted an English-only policy and required all portions of the driver's license, including the written examination, to be conducted in English. An applicant for a driver's license applicant, Martha Sandoval, challenged the policy under the Fourteenth Amendment and title VI of the Civil Rights of 1964.[33] It is interesting that eight months after going to English as the only language for the examination, the Department sought an Attorney General's Opinion regarding whether Amendment No. 509 required it to offer the tests only in English. The State Attorney General responded that the Amendment did prohibit the Department from offering any language other than English, although it suggested that the English-only policy "might be a violation of title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment."[34] The Eleventh Circuit resolved the case on the basis of title VI. Citing *Lau v. Nichols*,[35] among other classic cases on language policy in education,[36] the court decided that Alabama's official English-only policy constituted an impermissible disparate impact on the basis of national origin. The court added that not providing language aids could equate to a disparate impact on the basis of national origin. In so doing, the Eleventh Circuit affirmed a grant of injunctive relief for Sandoval and the members of the class she represented that ordered the state of Alabama to offer the test in languages that accommodate language minorities.

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[31] 197 F.3d 484 (11th Cir. 1999).

[32] *Id.* at 488.

[33] 42 U.S.C. § 2000.

[34] *Sandoval, supra* note 31 at 487.

Sandoval seems to provide an important analysis of title VI's requirements that may be instructive to school leaders and may be seen as a counterweight and threat to the current trends toward English-only programs and referenda. It is also worth recalling that since title VI applies to recipients of federal funding, it covers most educational institutions and many private schools and universities. Moreover, *Sandoval's* holding that no discriminatory intent need be proved in similar title VI cases, only disparate impact, the Eleventh Circuit may have made it easier for language minority plaintiffs to prosecute such cases since it links failure to provide language aids that allow language minorities to benefit from federally funded programs with national origin discrimination. Thus, because *Sandoval* implicates important rights, it and its eventual progeny merit attention by school leaders and their attorneys.

Illegal Gratuity Statute

Sun-Diamond Growers, a trade association engaged in marketing and lobbying activities, was indicted for violating the federal Illegal Gratuity Statute by reason of having given $5,900 in illegal gratuities to Secretary of Agriculture Micael Espy. The statute provides, in part, that anyone who:

> otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.[37]

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[35] 414 U.S. 563 (1974).

[36] *See* especially Castaneda v. Pickard, 648 F.2d 989, 1008 (5th Cir. 1981).

[37] 18 U.S.C. § 201(c)(1)(A).

The indictment against the trade association alluded to two matters in which it had an interest in favorable treatment from Secretary Espy at the time it bestowed the gratuities. However, the indictment did not specifically allege a connection between either matter or between any other action of the Secretary and the gratuities conferred. In light of this omission, Sun-Diamond Growers petitioned the federal district court in the District of Columbia to dismiss this count of the indictment. The court refused, writing:

> To sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position.[38]

An instruction similar to the court's ruling was given the jury, which found the association guilty. On further review, the Court of Appeals for the District of Columbia reversed the conviction and remanded for a new trial, stating: "Given that the 'for or because of any official act' language means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands."[39] Subsequently, the Supreme Court affirmed that "in order to establish a violation of 18 USC § 201 (c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[40]

The clarification provided in *Sun-Diamond Growers* regarding the Illegal Gratuity Statute is important to both public officials, including public education officials, and those seeking to inform and influence them.

Search and Seizure

Some search and seizure issues in schools are currently relatively settled. For example, administrators and students are generally aware that lockers in schools are subject to search, and it has become well accepted, as a general rule, that students do not have a reasonable expectation of privacy in lockers. However, there are areas that are currently undergoing change. For example, drug testing of students involved in extracurricular activities is one area that has been discussed widely by practitioners and scholars. Even so, in American life the search and seizure of automobiles has been a complicated area.

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[38] United States v. Sun-Diamond Growers of Cal., 941 F. Supp. 1262, 1265 (D. D.C. 1996).

[39] United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 968 (D.C. Cir. 1998).

[40] United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999).

Certainly, as a subjective matter, Americans and American students tend to have an expectation of privacy in their automobiles and their belongings transported therein. Yet, for Fourth Amendment analysis, "reasonable expectation of privacy" is not based merely on the subjective expectations of individuals, but also on the expectations of privacy that society collectively wishes to recognize and protect. In 1999, the Supreme Court dealt with several search and seizure cases involving automobiles that may have implications in school settings. In *Maryland v. Dyson,*[41] the Court examined the warrantless search of an automobile that police officials believed contained illegal drugs. A Sheriff's Deputy received a tip from a reliable informant that the petitioner had left Maryland, traveling to New York by automobile, to purchase a large quantity of cocaine and would be returning to Maryland with the drugs later that day. The tip included the name of the petitioner and the type, make, color, and license number of the vehicle. Upon investigation, the deputy confirmed that the individual was a known drug dealer in Maryland and had rented a car of the type, color, and license specified by the informant. When the petitioner returned to Maryland in the rented car later that day, deputies stopped and searched the vehicle, locating twenty-three grams of crack cocaine in a duffel bag in the trunk. The petitioner, based on this evidence, was convicted of conspiracy to possess cocaine with intent to distribute. He appealed his conviction on the dual grounds that police lacked probable cause for the search, or in the alternative, if probable cause was found, that the search violated his Fourth Amendment rights because police had sufficient time to obtain a search warrant but neglected to do so.

The Maryland Court of Special Appeals reversed the conviction,[42] indicating that while there was insufficient probable cause for the search, there were no exigent circumstances that would have allowed a warrantless search, since officers had sufficient time to obtain a warrant without difficulty. Subsequently, the Maryland Court of Appeals refused to hear an appeal.[43] On further review, the Supreme Court reversed and affirmed the conviction. The

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[41] 527 U.S. 465 (1999).

[42] Maryland v. Dyson, 712 A.2d 573 (Md. Ct. Spec. App. 1998).

[43] Maryland v. Dyson, 718 A.2d 235 (Md. 1998).

Court found that its own precedent in *Pennsylvania v. Labron,*[44] and *United States v. Ross*[45] enunciated its clear position that there is no specific requirement of exigency to justify a warrantless automobile search if it is predicated on facts sufficient to justify a search warrant.

Lower courts have tended to see the rationale for warrantless searches of cars as based on the high mobility of vehicles and the concern that contraband or evidence of illegal activity may be lost if a warrant is obtained. Consequently, lower courts have decreed that when it is possible to obtain a search warrant, one should be required. The Supreme Court clearly rejected such a view, declaring that probable cause is all that is required to search a vehicle.

In *Wyoming v. Houghton,*[46] the Court posited that in conducting a warrantless automobile search, a search of a passenger's personal belongings in it, including handbags or containers that are capable of concealing contraband, does not violate the Fourth Amendment. The Court was satisfied that once there is probable cause to search an automobile, then containers and packages may be searched in the vehicle. In *Houghton*, the probable cause was the presence of a hypodermic needle in plain view in the shirt pocket of the driver. The Court was of the view that when a passenger who is not under suspicion of having committed a crime owns a package that is searched, the search does not automatically violate the Fourth Amendment. The Court commented that passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars. The Court also offered that these were not intrusive body searches but were less intrusive searches of packages.

The Court's pronouncement authorizing warrantless searches of automobiles and broadly defining the scope of searches that may be conducted during such searches provides further protection for school administrators who believe they have sufficient reason to search a student's automobile in a school parking lot. Although cases dealing with automobile searches can be seen as a steady trend lessening Fourth Amendment protections, the Court has not done away with the need for probable cause in automobile searches outside of school settings. This seems to reaffirm the need for some particularized suspicion on the part of school officials before searching student automobiles in school parking lots. Further, in *Knowles v. Iowa*,[47] the Court maintained that the full search of an automobile during the issuance of a speeding citation, authorized by an Iowa statute, violates the Fourth Amendment. The Court refused to extend the search incident to arrest exception to authorize such searches of an auto simply where a speeding citation is being issued absent probable cause to believe that a crime other than the infraction of speeding has occurred and that evidence of that crime is secreted in the car.[48]

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[44] 518 U.S. 938 (1996).

[45] 456 U.S. 798 (1982).

[46] 526 U.S. 295 (1999).

[47] 525 U.S. 113 (1999).

Another case that may be of interest in light of the relatively recent, but growing, trend for schools to install surveillance cameras is a Ninth Circuit holding from Montana. Here, police set up surveillance cameras in the Kootenai National Forest with motion detector triggers to monitor a discovered field of marijuana plants. The defendants were subsequently recorded on the cameras at work and harvesting in the field. Among other issues, the trial court dealt with whether this warrantless camera surveillance violated the defendants' Fourth Amendment rights in an area where they had a legitimate expectation of privacy.[49] Although the defendants claimed that they had a subjective expectation of privacy of not being photographed or caught on surveillance cameras in a remote National Forest area, the court returned to earlier rubrics and ascertained that subjective expectations of privacy alone do not control in this area. Citing *Katz v. United States*,[50] the court reflected that: " a reasonable expectation of privacy exists if a person has an actual subjective expectation of privacy and if the expectation is one society is prepared to recognize as objectively reasonable."[51] On appeal, the Ninth Circuit affirmed that the use of surveillance cameras did not violate the defendants' Fourth Amendment rights.[52] The court discussed at some length expectation of privacy and other Fourth Amendment issues involved with surveillance video cameras and other technologically aided surveillance. First, the court reasoned that the police officers involved would have been justified in conducting a twenty-four hour surveillance of the marijuana field. Then, citing its own precedent in *United States v. Dubrofsky*, the court concluded that:

> Permissible techniques of surveillance includes more than the five senses of the officers and their unaided physical

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[48] *See also Flippo v. West Virginia*, 528 US 11 (1999), wherein the Court rejected any general "murder scene exception" to the requirements of a search warrant. The court found that constitutionally impermissible to search an accused's home simply because police were investigating a homicide that had recently occurred there.

[49] United States v. Eberle, 993 F. Supp. 794 (D. Mont. 1999).

[50] 389 U. S. 347 (1967).

[51] *Eberle, supra* note 49 at 798.

[52] United States v. McIver, 186 F.3d 1119 (9th Cir. 1999).

> abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case. We reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective "mechanical eye" to continue the surveillance.[53]

This case, representing the Ninth Circuit's thoughtful examination of the issues of surveillance cameras, may help adumbrate the way these issues will be treated in schools, since they are areas that could be seen as "public," such as National Forests, and surveillance cameras within schools can be seen as the mere cost-efficient extension of the right to post a twenty-four hour security guard. However, technology now permits relatively pervasive surveillance throughout what are often widespread and extensive grounds in public schools. Although this case is a good example of how the issues that might arise in school settings might be analyzed, bright line distinctions will be difficult to make. It does seem relatively clear that when students are given notice that they are under surveillance, their expectations of privacy may be lessened. What about visitors, even trespassers? The growing use of relatively massive high tech surveillance camera banks and recording computers in schools may, at some time, become problematic constitutionally, but this case seems to support the use of such cameras in widespread public areas to gather evidence of criminal activity and violations of school rules.

Voting

During 1999, the Supreme Court reviewed three important cases concerning voting rights and election procedures that indirectly impact education. The first clarified preclearance procedures related to the Voting Rights Act of 1965. The second dealt with a Colorado statute involving state imposed restrictions on initiative petitions. The third involved the use of sampling techniques in conducting the 2000 national census.

Designated states and political subdivisions are required under section 5 of the Voting Rights Act of 1965 to obtain federal preclearance from either the United States Attorney General or from the District Court for the District of Columbia before giving effect to changes in their voting laws. California, a state not subject to the Act's preclearance requirement, passed legislation altering the scheme for electing judges in Monterey County. When the county elected not to seek preclearance, a group of Hispanic voters residing in Monterey County filed suit, claiming that the county failed to comply with section 5 of the Voting Rights Act. A federal trial court dismissed the action on the basis that since California was not subject to the preclearance requirement and since the county was simply implementing a state law independent of any exercise of discretion, it was not necessary to comply with section 5 of the Act. On appeal, the Supreme Court reversed, relying on an analysis of the statute's plain language and the Attorney General's interpretation. The Court observed that "the Act's preclearance requirements apply to measures mandated by a noncovered state to the extent that these measures will effect a voting change in a covered county."[54] This interpretation of section 5 of the Voting Rights Act means that school districts that are covered jurisdictions must obtain preclearance for any voting change, even one that is required by state law, regardless of whether a state is subject to the preclearance requirement.

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[53] 581 F.2d 208, 211 (9th Cir. 1978).

The American Constitutional Law Foundation and individual plaintiffs alleged that six prescriptions of Colorado's law governing initiative petitions violated the free speech clause of the First Amendment. The six prescriptions were the requirements that petition circulators be eighteen years of age; that circulators be registered voters; that petition circulations be limited to six months; that circulators be required to wear identification badges identifying their names and whether they were volunteers or being paid and, if being paid, the names and telephone numbers of their employers; that circulators attach to each petition an affidavit containing their names and address; and that when petitions are filed, disclosures be made as to the amount of money paid each circulator as well as the amount paid per petition signature.[55] Colorado's espoused purpose in creating these requirements was to protect the integrity and reliability of the ballot-initiative process.

The federal trial court in Colorado struck down the badge requirement and portions of the disclosure requirements but upheld the rest of the law.[56] The Tenth Circuit[57] and Supreme Court, in *Buckley v. American Constitutional Law Foundation*,[58] upheld the age restriction, the six-month limit on petition circulation, and the affidavit requirement. The Court struck down the requirement that petition circulators be registered and partially struck down provisions relating to badges and disclosures. Specifically, the Court vitiated the requirement that circulators had to display their names on their badges. This case can be seen as a victory for those who support the initiative petition process, including those initiatives designed to impact the governance and delivery of public education.

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[54] Lopez v. Monterey County, 525 U.S. 266, 269 (1999).

[55] *See* Colo. Rev. Stat. § 1-40-108 - 112.

[56] American Constitutional Law Found. v. Meyer, 870 F. Supp. 995, 1001-1004 (D. Colo. 1994).

[57] American Constitutional Law Found. v. Meyer, 120 F.3d 1092 (10th Cir. 1997).

[58] 525 U.S. 182 (1999).

Department of Commerce v. United States of House of Representatives[59] was a high profile case involving the use of sampling techniques in conducting the 2000 national census. The Supreme Court, affirming a judgment of a federal trial court in Virginia, was convinced that section 195 of the Census Act specifically prohibits the use of sampling in calculating the population for purposes of apportionment. The intended purpose of utilizing sampling techniques was to address the problem of accounting for a portion of the population that the census has historically failed to reach. The shortfall has been labeled as the census "undercount." As noted by the Court, "[s]ome identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole."[60] This case could have significant implications for school districts, since "[f]uture allocation decisions [for state and federal funding] may be made on the basis of the results of the 2000 Census, and because many minorities and other families in low-income areas are likely to be undercounted, states and school districts that serve higher proportions of such individuals could receive less funding than they would have expected under a census count that used sampling."[61]

Worker's Compensation

In 1993, Pennsylvania amended its worker's compensation system by creating a utilization review procedure under which the reasonableness and necessity of an employee's past, ongoing, or prospective medical treatment could be reviewed before a medical bill was paid. The amended portion of the Act was challenged on the ground that withholding workers' compensation benefits without predeprivation notice and an opportunity to be heard deprived affected individuals of their property rights in violation of due process. Insofar as this case was directed against both state and private defendants in the form of insurance companies that administered the program, all were charged as acting "under color of state law."

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[59] 525 U.S. 316 (1999).

[60] *Id.* at 322-323.

[61] John Borkowski and Alexander E. Dreier, "The 1998-99 Term of the United States Supreme Court and Its Impact on Public Schools," 138 *West's Educ. L. Rep.* 1, 13 (1999).

A federal trial court dismissed the private insurers from the suit on the ground that they were not "state actors" and later dismissed the state officials for not having violated due process.[62] The Third Circuit reversed and reinstated the claims against both the private insurers and the state.[63] On further review, in *American Manufacturers Mutual Insurance v. Sullivan*,[64] the Supreme Court, in turn, reversed. As to whether the defendants were acting under color of state law, the Court believed that the plaintiffs did not argue that the attempt to invoke utilization review should have been attributed to the State since State actors were directly involved in the decision-making process. Instead, as the Court pointed out, they argued that payment to providers may fairly have been attributable to the State, since it authorized and encouraged such an approach by amending the Act. In rejecting this line of reasoning, the Court stated:

> We do not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be seen as encouraging them to do just that. But, as petitioners note, this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it.[65]

The Supreme Court held that resolution of the of state-action issue was sufficient to reverse the judgment of the Third Circuit but chose to address the due process issue as well. On the due process issue, the Court declared:

> The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty." . . . Here, respondents contend that Pennsylvania's workers' compensation law confers upon them a protected interest in workers' compensation medical benefits. Under state law, respondents assert, once an employer's liability is established for a particular work-related injury, the employer is obligated to pay for certain

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[62] Sullivan v. Butler, 1996 WL 654032 (E.D. Pa. 1996).

[63] Sullivan v. Barnett, 139 F.3d 158 (3rd Cir. 1998).

[64] 526 U.S. 40 (1999).

[65] *Id.* at 53.

> benefits . . . . It follows from this, the argument goes, that medical benefits are a state-created entitlement, and thus an insurer cannot withhold payment of medical benefits without affording an injured worker due process. Respondents' property interest in this case, however, is fundamentally different. Under Pennsylvania law, an employee is not entitled to payment for *all* medical treatment once the employer's initial liability is established . . . . Instead, the law expressly limits an employee's entitlement to "reasonable" and "necessary" medical treatment, and requires that disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay—and an employee's entitlement to benefits—arise . . . . Thus, for an employee's property interests in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary.[66]

In light of the rising cost of medical services and nationwide efforts to find ways to curb unnecessary medically related expenses, it is not unlikely that similar modifications in worker's compensation plans will develop in other states and thus impact on the operations of school districts.

Conclusion

Insofar as the cases in this chapter did not arise in educational settings but may impact educational issues, they require some foresight and imagination to see their relevance and applicability. Some of the more sweeping and applicable cases in this chapter include new definitions of disability as they affect reasonable accommodations for students and employees under the (ADA). These parameters have not been fully enunciated in educational settings but should be watched in the coming year. It seems clear that for the near future, the Supreme Court is not going to act to harmonize some of the conflicts among the Circuits on drug testing students in athletics and/or extra-curricular activities. This important area of student rights will remain somewhat unsettled. Similarly, the Court's decision regarding anti-loitering statutes touches on fundamental rights. It is not necessarily a clear change in direction but may signal that caution is advised before venturing too far with policies that impact fundamental rights of association of students. As a final observation, it should be noted that this chapter has omitted several cases in which the Supreme Court has begun to set markers that outline the contours of sovereign immunity of state entities. This emerging trend seems to be to give states more ability to declare themselves immune from suit. Thus, the Court seems to be tending to limit what actions constitute functional or presumptive waivers of immunity by states from being sued under federal statutes or by federal regulators. This may come to have implications for leaders in schools and higher education. However, for now, a cautious awareness of the nascent trend, coupled with a determination to follow such cases in coming terms, may suffice.

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[66] *Id.* at 59-61 (internal citations omitted).

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AUSTRALIA

Douglas J. Stewart

Introduction

Tertiary institutions in Australia do not offer a separate discipline of school or education law. Consequently, issues dealing with the impact of law on the schools have only become a matter of major concern during the past decade. In part, this is a result of there having been, historically, a reluctance by students, parents, and/ or others to seek legal redress for harms incurred in school settings. There is now, however, an increasing willingness to use the law for such purposes that are reflected in the growing number of cases coming before various tribunals. Moreover, although litigation dealing with physical injuries suffered by students in school-related accidents remains the largest single area of concern, the range of legal matters has also increased considerably. This chapter considers cases addressing negligence and, in particular, physical injuries incurred by students in school settings with specific emphasis on those that have been occasioned by a lack of teacher supervision. The chapter also examines recent cases on emergent areas of concern to school administrators and classroom teachers.

Negligence and Physical Safety of Students

In Australia, school officials require teachers to supervise students during recess periods including lunch, morning, and afternoon tea breaks. In addition, various judicial opinions have resulted in the duty of care schools owe to students extending to other times outside of normal classroom hours. As such, this chapter reviews cases associated with injuries sustained by students where teachers failed to provide supervision or, where it was provided, was inadequate or improper. The main purpose of this section is to analyze relevant case law in order to identify the best, legally safe, supervisory practice in Australian schools.

Supervision of Students

Although there is not a great volume of case law dealing with the topic, the physical safety of students has long been a concern of teachers in Australian schools. Yet, while there has not been a floodgate of cases, there is now ample evidence of school staff being held increasingly accountable for their actions. This is evident in recent cases dealing with lack or inadequacy of supervision across a number of student activities.

The failure to provide adequate supervision or to carry out supervision effectively is the core issue to do with students' physical welfare. Major concerns have dealt with supervision outside of official school hours, in classrooms, on excursions, and when using sports and other equipment. The main legal issues are whether a duty of care exists, whether the duty has been breached, and whether any harm caused is a direct result of the breach of the duty. In examining breach of duty, courts pay particular attention to the standard of care provided. Judicial expectations concerning duty of care in relation to teacher supervision of students while in a school's care were canvassed in a 1966 case in which Wolff, C.A., stated:

> A schoolmaster is under a duty to exercise supervision over his pupils when they are on school premises, either in the school room or the playground. The amount of supervision required depends on the age of the pupils and what they are doing at the relevant time. During hours of instruction a greater degree of supervision is required than during hours of recreation. When normally healthy children of school age are in the playground, it is not necessary that they should be under continuous supervision, even if some children are only six years old.[1]

If the headmaster knows, or ought to know that the pupils on the school premises are playing dangerous games or doing acts in such a manner or in such a place as are likely to cause injury to one another and does not prevent it, he is liable in negligence.

Less than a decade after Wolff made this statement, the High Court of Australia expressed more stringent requirements regarding the duty of care owed to students when they are on school premises.[2] Wolff, J., noted that the standard of care required when there are upwards of several hundred students present on school grounds will be more demanding than is the case where there are thirty or so in a classroom. The central issue in this case, heard in the High Court of Australia in 1977, was whether a duty of care exists for students' welfare before or after school. The New South Wales Department of Education had a regulation that school officially commenced with the beginning of classes at 9 a.m. The question the High Court had to resolve was whether a duty of care existed for students who were on school grounds prior to that time. An eight-year-old student received serious brain damage when hit on the head by a baseball bat wielded by a child who was taking part in a game on school grounds prior to commencement of classes.

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[1] Iggelsdon v. The Minister for Education (Unreported, Supreme Court of West Australia, July, 1966).

[2] Geyer v. Downs (1977) 138 C.L.R. 91

The principal had permitted students on school grounds on the belief that it was safer than keeping them outside the gates on a busy road. Yet, no formal supervision was provided for students who arrived at school early, although there was evidence that the principal checked on the children from time to time. In evidence the principal also indicated that he did not allow dangerous sports equipment to be used by early arriving students. The court ruled that there was a duty of care. In essence, this case means that the known, or ought to be known, presence of children on school grounds is sufficient to establish a duty of care. This duty necessarily would include adequate and appropriate supervision.

Supervision Before and After School

The question of whether a duty of care for students exists prior to commencement of classes was also considered by the High Court in an incident in a school in the Australian Capital Territory.[3] A student was injured when, while swinging on the halyards of the school flagpole, it broke and part fell on him. Only one teacher was allocated to supervise the 900 students who were on the school grounds at the time. Evidence was presented that, despite a school regulation forbidding swinging on the halyards, students frequently took part in this activity. Murphy, J., wrote that in considering the duty of care "[t]he standard of care must take into account the well known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards."[4]

The extent of the supervision required before classes commence was recently addressed by the County Court of the State of Victoria.[5] Government schools in Victoria have a regulation requiring supervision "for at least ten minutes before the beginning of the morning session." The regulation also stipulates that "enough teachers are required to be on duty to supervise the school adequately." A student had been banging a stick against a metal post and a part broke off hitting the female plaintiff, causing her to lose an eye. The incident occurred before the commencement of classes. In the judgement, Dove, J., determined that there was no reason why "lesser supervision should be required immediately prior to the commencement of the morning session than was required for recess or lunchtime."

A duty to supervise students on school grounds after normal classes have concluded was the subject of an appeal to the High Court in 1972.[6] A six-year-old student was playing on school grounds when he was hit in the eye by a ball moulded from slaked lime. The lime was taken from a pile left by employees from the Department of Public Works, who had been carrying out building works at the school. Evidence was given in which it was clear that the boys had permission to be on the school grounds and that it was common practice for children to do so after school. The High Court affirmed a trial court's finding that there was a breach of the occupier's liability to the child as a licensee.

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[3] Commonwealth v. Introvigne (1982) 150 C.L.R. 258

[4] *Id.* at 274

[5] Psaila v. State of Victoria and Caesar (Unreported, County Court of Victoria, June, 1998).

[6] Ramsay v. Appel (1972) 46 A.L.J.R.510

However, a very recent case resulted in a teacher's being held not liable for an injury sustained by a young elementary school student who had reentered the school grounds after he left for the day.[7] There was evidence that it was a common practice for children living near the school to go back on to the school grounds, as there was a lack of parks or playgrounds in the local area. The school was not liable on the basis of school officials' having sent out frequent reminders to parents advising them that the school was out of bounds to children during non–school hours. Further, school officials had instituted a practice of teachers checking the grounds and buildings after the end of the school day.

Schools have a duty to provide adequate supervision during normal recess times such as lunch or morning/afternoon tea breaks. In a recent case both the level of supervision provided by the school principal as well as the way in which teaching staff were carrying it out were determined to be appropriate and adequate.[8] The plaintiff-student had another congenital condition such that when he received a kick from another child, he developed a serious permanent injury. Neither the plaintiff nor his parents had informed school officials of the condition. Moreover, when the scuffle leading to the injury had broken out during a lunch break, teachers moved quickly to intervene. Miles, C.J., observed that since there was no reason for the teacher to believe that the fight would resume after he had left the scene, there was no failure of any of the six supervising teachers to carry out their responsibilities appropriately. He also pointed out that the principal had rostered one teacher for every fifty students and that this was the maximum that could be expected given the resources of the school.

Supervision of Students While in Class

Australian courts have decided over the years that a high level of supervision is required if teachers are to meet the appropriate standard of their duty of care for students while they are in classrooms. Winneke, J., observed in a 1969 case that the duty to supervise was to be sufficient so as to prevent a student from harming him or herself as well as from being harmed by or harming others.[9] In commenting on this analysis, Ramsay and Shorten[10] observed that Winneke, J., also added that it is neither possible nor desirable to provide complete protection for students. Rather, what is adequate is for students to be protected from foreseeable harm.

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[7] Strath v. State of New South Wales (Unreported, Supreme Court of New South Wales (NSW), April, 1999).

[8] Romel El Sheik v. Australian Capital Territory Sch. Auth. (Unreported, Supreme Court of The Australian Capital Territory, August, 1999).

Despite the extensive supervision required in classroom settings, courts have not required it to be constant. This is illustrated by an incident in which a twelve-year-old student was injured when, in the absence of her teacher, another pupil pushed her off of her chair.[11] Jacobs, J., in the Supreme Court of South Australia, explained that the absence of the teacher was not a breach of the duty because she had left strict instructions as to the expected behaviour of the students in her absence. Further, the teacher had written instructions on the chalkboard regarding work she required students to complete. The court also maintained that it could not be established that the cause of the injury was due to the teacher's absence.

It also is likely a supervising teacher will be found negligent when the teacher fails to stop a fight between two sixteen-year-olds, an event that occurred while they were taking a chemistry lesson, and as a result, one student was paralysed.[12] In this incident, the court reasoned that the teacher was partially at fault, although the main liability lay with the principal who had known of the teacher's supervisory weaknesses. In another case, a teacher was held negligent for failure to control a dangerous classroom activity that resulted in a student losing the sight in one eye. Here, the High Court declared that the teacher had known and disregarded the unruly and dangerous practice of students over a long period during a lesson. The students' behavior included firing paper pellets at each other using elastic bands.[13] The court was able to infer that a causal relationship existed between the failure of the teacher to maintain discipline and the injury to the student. However, in another incident,[14] a teacher was not liable for the injuries sustained by a student when another child threw a paper glider at him and caused him to lose sight in one eye. In the week previous to the incident, the principal expressly forbade students from playing with toy gliders in classrooms. He had restricted their use to the school oval and, then, only under supervision of the teaching staff. The court asserted that the boy's injury was a result of his own disobedience.

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[9] Richards v. State of Victoria [1969] VR 136

[10] Ramsay I. & Shorten, A. *Education Law*. Sydney: Butterworths. p. 184

[11] Barker v. State of South Australia (1978) 19 S.A.S.R. 83.

[12] *Supra* note 6

[13] Victoria v. Bryar (1970) 44 A.L.J.R. 174.

[14] Syme v. Minister for Education (Unreported, Supreme Court of West Australia. No 83, 1969).

Chief Judge Winneke remarked that the duty of care owed to a student is based, in addition to the principles of proximity and foreseeability, on:

> The need of a child of immature age for protection against the conduct of others, or indeed of himself, which may cause him injury coupled with the fact that during school hours the child is beyond the control and protection of parents and is placed under the control of the school master who is in a position to exercise authority over him and afford him, in the exercise of reasonable care, protection from injury.[15]

Supervision of Students While on School Excursions

Historically, school accidents have usually arisen from incidents that occur on school grounds or in school buildings. However, with the considerable increase in school excursions that take students away from the familiar and hence relatively safe surroundings of the school to alternative and frequently hazardous sites, there is potential for them to be exposed to a far greater range of dangers than exists at school.

The basic parameters of legally safe policies and practices associated with school excursions was set out by Lazarus, J., in a decision reached in the County Court of Victoria in the mid 1980s.[16] In essence, in order to ensure they exercise an appropriate standard of care schools are required by the decision to: (i) provide sufficient information to parents to enable them to make an informed appraisal of the features of the proposed excursion – not only as to students physical safety but also as to relevance and value of the curricula activities to be undertaken; (ii) gain the permission of the appropriate school authority to hold the event; this necessitates full information being provided, including a detailed description of all activities to be undertaken as well as their place in the school curriculum; and (iii) provide full emergency medical and evacuation procedures.

The extent of the duty may be seen from an incident in 1984 in which a twelve-year-old boy died from burns received when his tent caught fire. The coronial inquiry judged that a teacher negligently placed a lantern too close to the tent.[17] In an earlier incident, another coronial inquiry investigated the death of a sixteen-year-old student as a result of hypothermia.[18] In this case, the student was one of twenty age fifteen to eighteen who had been on an eight-day trek around the rugged Cradle Mountain region of the island State of Tasmania. The court was of the view that the students were inadequately prepared for the excursion and that their clothing was inappropriate for the extreme weather conditions common in Tasmania. Indeed, the party encountered gale force winds, snow, and sleet, and the teachers supervising the excursion had not carried out an inspection of students' equipment or clothing. Neither had there been any appraisal of the fitness of any of the students nor of any member of the supervising staff to undertake the strenuous demands of the trek.

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[15] Richards v. State of Victoria [1969] VR 136 at 138-139.

[16] Nicholas v. Osborne (1985) County Court, Victoria (Unreported, 15 November, 1985).

A coroner's court inquiry in 1980 investigated the death by drowning of a fifteen-year-old student while on an excursion to an island off the coast of South Australia.[19] A sign at the spot where the students entered the water clearly warned bathers that there were strong under currents in the area. The coroner commented, in part, that teachers supervising the students should have been alerted to the dangers at the beach and noted that teachers were in "immediate control or supervision" at the time.

A recent case in the district court of Queensland dealt with the issue of the safety of equipment supplied to students when on an excursion.[20] Here, a student suffered a broken shoulder when she fell from a bicycle which had faulty brakes and which had been supplied by the recreation centre accommodating the students. The court ascertained that the centre was 80% responsible for the accident, and the State of Queensland, as the employer of the teachers, was 20% accountable. In her opinion, O'Sullivan, J., decreed that schools should be able to trust that activities organised for school camps are safe. The school authorities should have at least warned students what to do if they found themselves in circumstances similar to those of the plaintiff.

The extent to which teachers must be aware of their supervising practices is well illustrated by an incident in which an eight-year-old boy was seriously mauled by a bear while visiting the local zoo.[21] There were more than 100 students present with three supervising teachers and a number of parents providing additional assistance. During the lunch break, two teachers left the group and the remaining teacher told the children they were free to go to any part of the zoo unsupervised, providing they were in pairs. The student climbed over the outer barriers to the enclosure and was seized by the bear when he wandered too close to its cage. The court ruled against the teacher because the West Australia Department of Education accepted vicarious liability.

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[17] Coroners Court, Victoria (Unreported, 20 February, 1986).

[18] Coroners Court, Tasmania (Unreported, 27 March, 1973).

[19] Coroners Court, South Australia (Unreported, 22 December, 1980).

[20] Sinclair v. State of Queensland (Unreported, Queensland District Court, 12 March, 1999).

[21] Giliauskas v. State of Western Australia and Minister for Education (Unreported, Supreme Court of Western Australia, July 1967).

Supervision and School Bullies

Research into bullying and violence in Australian schools and elsewhere clearly demonstrates that victims frequently suffer from health and other problems. In earlier decades, bullying behaviour tended to be tolerated by students and schools. Now, however, there is evidence that students are willing to use legal measures, including where necessary, the courts, to seek redress for harm caused from bullying by other students or school staff.

Two recent cases have considered this problem and the main issue in each was to do with the number of supervising teachers as well as the adequacy of the supervision being carried out. In the first, a teacher and school principal were judged to have failed to provide adequate supervision to cover school grounds when a physically disabled student was severely injured by another pupil who had a reputation as a school bully.[22] In the second, the court was convinced that a principal breached his duty of care by "accepting violent and aggressive students to the school without properly checking on their past histories from their previous schools."[23]

The efficacy of supervising teachers intervening in fights between students was established in a case in which a student was injured when a teacher intervened in an altercation between the student and another pupil. The court rejected a claim that the teacher was negligent when he put himself at risk by attempting to prevent the students from harming each other.[24]

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[22] Grey v. State of New South Wales (Unreported, Supreme Court of NSW, 27 February, 1998).

[23] Stephens v. State of Victoria (Unreported, County Court of Victoria, 2 June, 1998).

[24] Miller v. Sotiropoulos (Unreported, New South Wales Court of Appeal, 18 August, 1997).

Due Process

Due process, or procedural fairness in dealings with students, is emerging as a legal issue in Australian school management. A student who attacked a female pupil with a knife challenged his exclusion by the principal of a government secondary school in New South Wales on the ground that it was beyond the powers conferred on the principal.[25] A series of school-based investigations of the incident was carried out, after which the principal suspended the student pending a final outcome. Investigations uncovered the fact that the student sexually harassed and threatened the female pupil on previous occasions, and that the school's counsellor prepared a report recommending that, subject to a number of clearly set out conditions, he be allowed to return to school. This report was not shown to the parents, who were subsequently interviewed by the principal. At this meeting the defendant's father, who had previously questioned the Department of Education procedures, was offensive and obstructive. The principal continued the suspension. A second report prepared by the counsellor recommended that the student not be permitted to return to school. A second meeting between the boy, his father, and the principal revealed that the boy showed no regret and offered no apologies or reasons for his behaviour. Rather, the student attempted to implicate other pupils in the matter under investigation. When the principal excluded the student from school, he communicated this news to the student and his parents, who then appealed to the Department of Education which, after further investigation, upheld the principal's action.

On appeal, the Supreme Court of New South Wales, Simpson, J., noted that a considerable volume of the material prepared by the school, which was damaging to them both, had not been conveyed to the boy or his parents. She added that the student had not been given any opportunity to examine and respond to those matters on which the decision to exclude him were based. Thus, she ordered a further review of the matter by an Officer of the Department of Education who had not previously been connected with the case.

Children with Special Needs

Legal protection for Australians is not provided in any Bill of Rights. Rather, it is contained in legislation enacted in each of the State, Territory, or

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[25] DM v. State of New South Wales (Unreported, Supreme Court of NSW, September, 1997).

Commonwealth jurisdictions. In relation to children, Australia has endorsed and ratified the United Nations Convention on the Rights of the Child. Even so, no jurisdiction has enacted specific legislation reflecting the duties contained in the Convention, and any rights recognised for children emanate from parliamentary statutes.

All Australian jurisdictions have anti-discrimination legislation that provides for, among other matters, children with special needs. The main issues that have arisen are to do with identification, placement, and resources, although Lindsay observes that "[t]he complaints have arisen in the main from attempts at the implementation of integration/normalisation policies of state education authorities . . . . "[26]

Providing resources for children with special needs will become an increasingly important area of litigation following cases dealing with the placement of such students in regular schools. A student who had suffered from profound deafness was enrolled at a regular, inclusive primary school. After two years at the school, the student's parents tried to locate an alternative school on the ground of alleged discrimination against their son. The parents' charges included his feelings of being excluded from school activities, alleged unfair discipline, and a succession of classroom teachers. The parents initiated complaints, alleging both direct and indirect discrimination, in the New South Wales Equal Opportunity Tribunal.[27] The allegations of direct discrimination were based on the student's having been treated less favourably than children who were not disabled. The Tribunal determined that there was a lack of evidence to support any of the allegations of either forms of discrimination and dismissed the complaint.

The basis of a complaint in Victoria was the removal of funding to schools that offered special education programs for students with disabilities who reached age eighteen. The state government eliminated funding for students who were age eighteen or over unless they were enrolled in the Victoria Certificate of Education (VCE), which forms the last two years of secondary schooling. This effectively excluded students eighteen and over who had special education programs outside of the VCE. One such program was established at special school with the intention of providing students with intellectual disabilities enhanced opportunities for post-schooling employment. Complaints alleging unlawful age and disability discrimination were heard initially before the Anti Discrimination Tribunal of Victoria.[28] Before any judgment could be reached, the complaints were referred to the Supreme Court.[29] The trial judge stated that there had been unlawful age-based direct discrimination as well as disability discrimination. The Department of Education[30] then sought further review by the Court of Appeal, which "overturned the finding of unlawful discrimination on the ground of age, but upheld the finding of indirect discrimination on the ground of impairment."[31]

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[26] Lindsay, K. "Integration in the Spotlight: *Demmery v. Department of School Education." In Australia and New Zealand Journal of Law and Education, Vol 3 , 1998.*

[27] Demmery v. Department of Sch. Educ. (Unreported, Equal Opportunity Tribunal of NSW, November, 1997).

The provision of resources was the central issue in an appeal case where a student with Perth's disease, involving hip disability, was unable to climb stairs to upper level classrooms. In her complaint to the Equal Opportunity Commission of South Australia, the student alleged stress and psychological health problems as a result of the school treating her less favourably than students without her disability. The tribunal was satisfied that the student established evidence of direct discrimination. On appeal, the Federal Court reversed on the basis that the Commission made an incorrect comparison between the student's actual treatment and what she might have ideally received.[32]

Parents of a child with spina bifida sought to enroll her in the kindergarten section of a non-government school in Sydney, New South Wales, which issued a prospectus declaring that the school catered to students with disabilities. The parents and the child were interviewed by the registrar at the school, but her application was eventually rejected. The parents complained to the Equal Opportunity Commission on the ground that the school had discriminated against their daughter on the basis of her physical disability. The school authority agreed that there had been discrimination but that it was lawful since the relevant legislation[33] contained provisions that allowed exemptions where an educational authority could show that there would be unjustifiable hardship incurred in order to make adequate arrangements to meet the needs of a disabled student. The school argued that it would not have been possible to meet the financial costs associated with altering school facilities or providing a teacher's aide. The Tribunal ruled in favour of the parents on the basis that there would have been a minimal hardship imposed on the school, and that officials advertised the school as catering to the needs of students with disabilities.[34] The Commission added that the school had sufficient funds to enable the required, but minimal, changes to its facilities, such as the provision of a special toilet. An appeal to the Federal Court claiming that the Commissioner from the Human Rights and Equal Opportunity Commission erred in misinterpreting the Disability Discrimination Act (1992) was dismissed. Tamberlin, J., of the Federal Court noted in his conclusion: "I am satisfied that no reviewable error of law or principle is shown in the reasons for the decision of the Commissioner."[35]

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[28] Bacon and Others v. State of Victoria (Unreported, Anti Discrimination Tribunal, Victoria, June, 1997).

[29] Bacon and Others v. State of Victoria (Unreported, Supreme Court of Victoria, November, 1997).

[30] State of Victoria v Bacon and Others (Unreported, Court of Appeal, Victoria, March, 1998).

[31] Lindsay, K. "What has age got to do with it? Discrimination in Education and Students with Disabilities." *Australia and New Zealand Journal of Law and Education, Vol. 4 (1) 1999, pp. 94-101.*

[32] "A" School v. Human Rights and Equal Opportunity Commissioner & Anor [1998] 1437 FCA (Federal Court, Adelaide, November, 1998).

[33] Commonwealth Disability Discrimination Act, 1992.

Conclusion

As awareness of individual rights has grown in Australia, there has been a change in community attitudes toward schools. This shift has resulted in a change to the historical reluctance by students and others to take legal action against educators or educational systems. Indeed, there is now a decided willingness to use the law as a mechanism to seek compensation for a range of perceived harms. However, in large part, the legal action most frequently utilised has been the tort of negligence, and this reflects the preponderance of incidents of physical injury incurred by students in school-related accidents. Nonetheless, there has also been a noticeable increase in students who use the courts to redress other alleged harms, including legal action having to do with due process and children with special needs. There is no doubt that such actions will become a frequent part of life in Australian schools. Consequently, school administrators, classroom teachers, and system authorities will need to more effectively implement preventive risk management strategies into their school policies and practices.

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[34] Finney v. Hills Grammar Sch. (Human Rights Equal Opportunity Commission, No H98/60, June, 1998).

[35] Hills Grammar Sch. v. Human Rights and Equal Opportunity Comm'n [2000] FCA 658 (18 May 2000).

CANADA

Anwar (Andy) N. Khan

Introduction

Last year's chapter on Canadian developments explained the historical backdrop and constitutional background of education law in Canada. This year's chapter concentrates on major legal developments that took place during 1999.

Constitutional Law

Distribution of Legislative Authority

At the time of the Canadian Confederation, one of the legislative settlements and compromises made in the British North America Act of 1867,[1] now renamed the Constitution Act of 1867, afforded special protection to Roman Catholic and Protestant schools. Section 93, which embodies the compromise (described by the courts as one of the cardinal terms of the Confederation arrangement), states that in and for each Province joining the Federation in 1867, the legislature may exclusively make laws in relation to education, subject, and according to, certain provisions. Among these provisions are that "[n]othing in such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools, which any Class of Person have by law in the Province at the of Union;"[2] and "[a]ll the Powers, Privileges, and Duties at the Union by law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic subjects in Quebec."[3]

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[1] The territories which joined the confederation and became its provinces after 1867 had to negotiate their own provision replacing section 93. For example, *see* Section 17 of the Terms of Union (Newfoundland) 1949.

[2] Section 93(1).

[3] Section 93(2).

These provisions continue to be subject of extensive litigation because they are so controversial and polemical. For example, the Ontario provincial Education Quality Improvement Act of 1977 introduced controversial amendments to the Education Act of Ontario by centralizing provincial governance and funding of education. One of the provisions of the legislation moved the power of local school boards to supplement provincial education grants through local property tax levies, thereby leaving provincial government with exclusive control over funding education systems, including the power to raise property taxes by establishing provincial tax rates. The intention of the provincial government was that public and separate denominational school boards (in Ontario's case, Roman Catholic) should have equal access to revenues on a per pupil basis. The legislation also placed limits on the ability of boards to make spending decisions such as prohibiting them from shifting funds designated for classroom use to non-classroom spending. The regulatory powers of the provincial Minister of Finance, including the ability to supervise the financial affairs of boards experiencing financial difficulties and to request a vesting order where a board fails to follow directions, were extensively increased.

Two applications were made for judicial review challenging the constitutionality of the legislation. The Ontario Court of Appeal ruled that the amendments to the Education Act, particularly removing the taxation power from separate school boards, were constitutional because the right to tax simpliciter is not constitutionally protected. Rather, the court interpreted the Constitution Act 1867 as guaranteeing to the separate school community the right to financial resources distributed in a fair and non-discriminatory manner so as to enable it to provide separate but suitable education for Roman Catholic children. The court conceded that the right to tax is one particular method of funding denominational education. Yet, it added that there is nothing denominational about the right to tax. The 1997 amendments do not prejudicially affect the right to funding. In fact, the amendments provide greater funding to separate schools than was previously given, while ensuring that educational funding is equitably distributed. The court concluded that if proper and adequate funding is available to separate school systems, they can continue to exist and provide education with a denominational character, with or without the right to tax. The court further suggested that "[i]t is the funding, not the right to tax, that is the necessity."[4]

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[4] While the school boards can close schools, their own closure guidelines must not be violated: Baker v. Burn Sch. Bd. for Dist. # 7 (1999) 178 D.L.R. (4th) 155.

This case, which was appealed to the Supreme Court of Canada, is likely to be merged with other appeals, so that it could make a consolidated and wider decision over whether the separate denominational school systems in Alberta, British Columbia, and Ontario have the right to levy their own taxes. This author wonders when in the twenty-first century the focus will be on educational equality and equity, in particular, secular, non-discriminatory and non-denominational morality and ethics in schools; and whether there is any justification for public funding of only Roman Catholic or Protestant schools. Yet, the Supreme Court of Canada cannot rewrite the Constitution. Since it can only expound the Constitution, it appears that in some provinces denominational school boards will remain a Canadian phenomenon. Nevertheless, this litigation has reopened the contentious issue and serious debate in Canada regarding whether some provinces should continue with separate publicly funded Protestant or Roman Catholic school systems even as they deny this right to other denominations or religions.

Equality Rights

The Equality Non-Discrimination Provision[5] of the Canadian Charter of Rights and Freedoms was raised in support of obtaining a declaration of unconstitutionality regarding the part of the Ontario Fewer School Boards Act of 1997[6] that barred the spouse of a board employee from election to a board or position as a school authority. The Ontario Court of Appeal, by a majority of four to one, held that although the stated objective of the disqualification is to reduce conflicts of interest, there was no adequate evidence that spousal conflicts of interest were a pressing or substantial problem. In evaluating whether equality rights have been infringed, the court applied the judicially-mandated three-fold test of whether the legislation imposes differential treatment, whether that treatment is based on a ground enumerated in the Canadian Charter or an analogous ground, and whether the effect or purpose of the law is discriminatory. The court reasoned that a restriction on spouses of employees was unconstitutional not only because it makes a

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[5] Section 15 (1) provides: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."

[6] The provision had been repealed, but was replaced in the Education Quality Act. Yet, since the wording was similar, the parties agreed that the appeal would be with respect to the new provision.

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distinction based on marital status but also because it has a discriminatory effect by arbitrarily disadvantaging spouses of board employees based on personal or presumed group characteristics.

The one dissenter on the five-judge panel asserted that although there is a distinction, the differential treatment is not discriminatory because it does not stereotype spouses by suggesting that their decision-making abilities are always in conflict with their capacity to resolve issues of a public nature and does not harm the human dignity of their spouses by any unfair treatment. The dissenter concluded that the provision was justified and not unconstitutional.

Denominational School Protections

Section 93(1) of the Canadian Constitution frequently appears in law reports on diverse issues. For example, in 1999 the Ontario Court of Appeal[7] declared section 136 of the Education Act of 1990 unconstitutional, null, and void because it contravened section 93(1) of the Constitution. The impugned section modified, by prohibition, the practice of allowing Catholic schools to give preference to members of their own faith when hiring, placing, and promoting teachers. The legislation did not include the exception found in the human rights legislation that a discriminatory act can be defended if it is a bona fide occupational requirement. The court noted that the practice was in vogue at the time of the Union because Catholic teachers were seen as the only possible means of imparting a Catholic curriculum and the practice of taking faith; this principle was accepted by Catholics and the rest of the community. The court commented that since a climate of religious animosity prevailed in pre-Confederation Canada, school trustees enjoyed, by law, the right to prefer Catholics when hiring teachers such that any change in that practice "prejudicially affects" and violates the denominational guarantee contained in section 93(1) of the Constitution Act 1867.

In another case, the same court had to consider the provision of a public Roman Catholic school board's newly-adopted policy that restricted non-Catholics from having positions of responsibility within the board. Non-Catholic teachers who were denied promotions submitted a grievance under their collective agreement, claiming that the policy was both unreasonable and contrary to the agreement and that it was discriminatory under the provincial Human Rights Code. A board of arbitration determined that the policy was permissible under the denominational education provisions of the Constitution. The board decreed that the right of the separate boards to manage schools to preserve their denominational character was not subject to review under the Human Rights Code. Thus, the board dismissed the grievance without evaluating whether the policy was justified under the legislative defense of bona fide occupational qualification.

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[7] Daly v. Ontario (Attorney General) (1999) 172 D.L.R. (4th) 241.

On the teachers' application for judicial review, the Ontario Divisional Court ruled that the policy was only protected to the extent necessary to maintain and give effect to denominational guarantees. The court was of the opinion that if the policy is a bona fide occupational requirement, it may be protected because it is necessary to preserve denominational education, but only to that extent. However, the board of arbitration failed to address this issue. The court, therefore, remitted the matter to a differently constituted board of arbitration. On appeal by the school board, the Ontario Court of Appeal confirmed the Divisional Court's reasoning and judgment.[8] In its decision, the appellate court asked, "[i]s the policy of prohibiting non-Catholic teachers from promotion, objectively viewed, reasonably necessary to preserve the Catholic nature of the schools? If so, the policy would be a reasonable and bona fide employment qualification within the meaning of [the Human Rights Code]."[9]

A case from the British Columbia Court of Appeal[10] had to interpret the phrase "public interest" in the Teaching Profession Act. Here a privately funded Christian University, which required its students to refrain from biblically prohibited practices including homosexual behavior, was refused collaboration with and by a publically funded teacher training college because college officials considered the university's policy to be against the values imbedded in the Canadian Charter and provincial human rights legislation. When the university applied for judicial review, the trial judge ordered the college to approve its program, subject to certain conditions. The Court of Appeal, by a majority of two-to-one, affirmed. The majority indicated that the public interest, in this context, was confined to establishing teaching standards and had little relevance to the university's moral code. Therefore, the majority believed that the Charter and human rights values should not have been considered, and that by doing so, the college erred by defining its jurisdiction with respect to these values. Further, the court pointed out that there was no evidence that professionally trained teachers would be intolerant.

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[8] Ontario English Catholic Teachers Ass'n v. Dufferin-Peel Roman Catholic Separate Sch. Bd. (1999) 172 D.L.R. (4th) 260.

[9] On the question of the approach to be taken with regard to the constitutional provision and its interpretation "with respect to Denominational Schools" in section 93(1) of the Constitution Act 1867, see Ontario Home Builders Association v. York Region Bd. of Educ. (1996) 2 S.C.R. 929; Attorney General of Quebec v. Greater Hull School Board (1984) 2 S.C.R. 575.

[10] The British Columbia Court of Appeal, in Trinity Western Univ. British Columbia College of Teachers (1999) 169 D.L.R. (4th) 234.

The dissenting judge noted that since the university's policy was discriminatory and defied the Charter and human rights values, the college's action was neither irrational nor patently wrong, and that it had jurisdiction to establish non-discriminatory standards for its members. The dissent observed that the college was obliged to consider whether the learning environment in public schools might be affected by discriminatory policies in a teacher education program. The judge posited that it is the college's duty and mandate to ensure that teachers do not transmit discriminatory beliefs or create discriminatory learning atmospheres.

Secular Education

Denominational protection applies only in provinces where it existed prior to 1867. The provinces that joined the Canadian Confederation after 1867 or where no such rights existed are immune from denominational protection. One example of sectarian public education is British Columbia, where the history of public education has been of a non-denominational school system. The first statutory provision for the colony of British Columbia relating to religion in public schools, enacted in 1865,[11] provided that all public schools were to be conducted strictly upon non-sectarian principles, that books inculcating the highest morality should be selected, and that all books of a religious character, teaching denominational dogma, would be strictly excluded. This was reconfirmed in the Public School Act of 1872. In 1891 the provision was amended to permit the use of the Lord's Prayer.[12] In 1976, the legislation added the word "secular" so that all public schools would be conducted upon strictly secular and non-sectarian principles.

The advent of the Charter of Rights and Freedoms, which provided for freedom of conscience and religion, led the courts to strike down the provision sanctioning the Lord's Prayer.[13] Accordingly, the British Columbia Parliament amended the School Act in 1989 to exclude the requirement of religious observance, establishing the rule that all public schools in the province should be conducted on strictly secular and non-sectarian principles; and that while the highest morality should be inculcated, no religious dogmas or creeds should be taught.[14]

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[11] The Common Schools Act, 1865 (No. 6 of 26-7 Victoria).

[12] The word used was "may." This was changed in 1948 when it became "shall" so that the Lord's Prayer became compulsory.

[13] See Russow v. British Columbia (1989) 35 B.C.L.R. 29, in which the British Columbia Supreme Court struck down the part of the legislation requiring a reading of a passage of the scripture and recitation of the Lord's Prayer, but severing and leaving in force the portion requiring schools to conduct it on a strictly secular and non-sectarian basis.

In a recent case, the British Columbia Supreme Court was faced with a question dealing with secular education.[15] At different times, a school board passed two resolutions. The first stated that resources received from gay and lesbian groups would not be approved for use in the school district. The second prohibited the use of books in kindergarten and lower grades depicting homosexual activity. On an application for judicial review, the Court unceremoniously and quickly disposed of the first resolution as unclear, arbitrary, and made without due consideration for the materials that were being banned. As for the second issue, the Court maintained that while it looked secular on its face, it had to resolve the issue by means of a thorough examination of the background in which it was passed to see whether, as a question of fact, it was based in a significant way on religious considerations. The Court ascertained that the board gave great weight to personal or parental concerns that the books would conflict with religious views. Despite acknowledging the unique bond between school trustees, entrusted with educating the young, and the parents whose children are being educated, the Court decided that the bond exists within the framework of the School Act, and that a board is not permitted to implement a policy based on religious views. The Court thus contended that the resolution violated the School Act as ultra vires. The Court also dismissed the board's arguments under the Canadian Charter's freedom of conscience and religion that the resolution sought to protect parental freedom of religion. The Court declared that freedom of religion includes freedom from religion.

Language Rights

Section 23 of the Canadian Charter of Rights and Freedoms provides for minority language educational rights. It states that where numbers warrant, Canadian citizens, whose first language learned and still understood is French or English, have the right to have their children receive either French or English language instruction at public expense. A 1999 case from Ontario presented the issue of whether this right extends to a parent whose first language was not that of the linguistic minority population of the province in which the parent lives.[16] The court gave a very wide and novel interpretation to the Charter provision in ruling that the section, as a remedial provision, deserves a liberal interpretation. Madam Justice Abella wrote that the general purpose of section 23 is to preserve and promote the two official languages and their respective cultures by ensuring that each language flourishes as far as possible in provinces where it is not spoken by the majority of the population. Insofar as this goes further than any previous decision, it remains to be seen whether the Supreme Court of Canada puts its stamp of approval on this expansive interpretation.

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[14] Section 76 of the present BC School Act continues the tradition and spirit of the 1989 amendments.

[15] Chamberlain v. Surrey Sch. Dist. No. 36 (1998) C.R.D.J. 180.

Discretion in Immigration Rules Where Children Are Involved

The Canadian Charter's values and aspirations, among other considerations, were taken into account by the Supreme Court of Canada in a case where a woman with Canadian-born dependent children was ordered deported. An immigration officer rejected the woman's application for exemption from the requirement that an application for permanent residence be made from outside Canada based on humanitarian and compassionate consideration under section 114(2) of the Immigration Act. The woman unsuccessfully applied for judicial review until the Federal Court certified the following question: "[g]iven that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the child as a primary consideration in assessing an applicant under section 114(2) of the Immigration Act?"[17] The court explained that the best interests of the children did not have to be given primacy in assessing such an application.

The Supreme Court of Canada reversed, with two justices dissenting, the effect of an international treaty that has not been incorporated into Canadian domestic law. The principle was that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law. However, the Court found that a reasonable exercise of the power and discretion given by the Act to an immigration officer and the Minister requires close attention to the interests and needs of children's rights because such an approach is consistent with the central humanitarian and compassionate values in Canadian society. The Court added that although discretionary actions are generally given considerable respect, discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Canadian Charter. After examining the duty of procedural fairness, the Court held that it is flexible and variable, depending on a statute's context and the rights affected. The Court wrote that where participatory rights are provided by statute, the aim is to ensure that administrative decision-makers use fair and open procedures appropriate to the choice at hand and its statutory, institutional, and social context, with an opportunity for those affected to put forward their views and evidence fully.

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[16] Abbey et al. v. Esses County Bd. of Educ. (1999) 169 D.L.R. (4th) 451.

[17] Baker v. The Minister of Citizenship and Immigration (1999) S.C.R. 1101.

Employment

Exclusivity of Collective Bargaining Arbitration

Many educational statutes provide for compulsory collective bargaining arbitration between employers and employees' unions/associations. The courts give due deference to arbitrators because they are the judges of facts and, unless they are wrong in law, the judiciary is reluctant to interfere, thereby providing finality to the proceedings. Even so, judicial supervisory jurisdiction can be invoked. In a case involving a tenured professor,[18] the Alberta Court of Appeal dismissed his challenge where an arbitration board upheld his dismissal on the grounds of insubordination, professional irresponsibility, and teaching incompetence. The court affirmed that the board correctly discerned that the university outlined the substance of its case against the professor and provided him with proper notice. Thus, the court was satisfied that there was no breach of procedural fairness or principles of fundamental justice and that since the arbitration board was not patently wrong, its judgment could not be disturbed.

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[18] Michel Bareau v. The Governors of the Univ. of Alberta, April 6, 1999 (Court of Appeal).

Wrongful Dismissal

All civil cases must be commenced within statutorily-defined periods of time after a cause of action allegedly arises. Such limitation statutes are known as "statutes of peace." In cases involving most public authorities, due to their special nature and responsibilities, periods of limitation are shorter because public authorities in Canada are shielded so they are not unduly prejudiced by the passage of time.

In *Des Champs v. Conseil des écoles separées catholiques de langue française de Proscott-Russel*,[19] eight months after a superintendent of schools was demoted as part of a reorganization and rationalization of French language educational services, he filed a wrongful dismissal action against the board under the Public Authorities Protection Act. The Act stipulates that a suit cannot be filed if an action is carried out pursuant to a statutory or other public duty or authority unless it is commenced within six months. The court rejected the board's request to dismiss the claim as statute barred because it viewed the complaint of conduct as more private than public in nature. The Ontario Court of Appeal overturned the trial judge, upholding the limitation defense and ruling that the conduct fell directly within the sphere of public action which is protected by the limitation period. The court concluded that the acts were not subordinate to the public duty but were directly within the sphere of public behavior protected by the statute.

On further review, the Supreme Court of Canada, by a six-to-one majority, allowed the superintendent's appeal and restored the trial judge's opinion. The Court decreed that in evaluating whether the limitation period should apply, a line has to be drawn between the public and private aspects of the duties and powers of public authorities as well as the challenged activity and the relationship between the two. The Court determined that the application of the six-month limitation period to a wrongful dismissal claim overshot the purpose of the statute because such a claim was not an attack on the school board's reorganization plan. Rather, because the Court considered the complaint as being directed against the board's in-house implementation of the plan, it observed that the action did not correlate to a public power or duty that the board exercised or owed. In short, the Court maintained that the statutory limitation period cannot be extended to any litigation resulting from a public authority's dealings with any of its servants.

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[19] (1999) D.L.R. (4th) 23.

The Supreme Court of Canada, concurrently with *Des Champs*, released another decision from the appeal of a school superintendent, who, as a result of statutory educational reorganization emanating from the previous fiscal year's huge financial deficit, was demoted and dismissed for redundancy. In this case, too, the Court overturned the Court of Appeal and allowed the litigation to proceed, because although the claim for wrongful dismissal was made one year after the dismissal, it indicated that the six-month limitation period was inapplicable.[20]

The Court, by a six-to-one majority, held that the appellant's complaint was not directed to the reorganization of schools, which was carried out in the public interest. Rather, the Court considered the appeal as focusing on the internal implementation necessitated by the reorganization, especially since the charge was directed at the superintendent's being singled out for redundancy when proper application of the Board's own seniority rules ought to have deflected the axe onto someone else. Therefore, while the Board's reorganization policy had a public aspect, the Court treated the claim as relating to board duties that are incidental or subordinate to its direct performance of its public mandate and were predominately of a private character. Thus, the Court asserted that the complaint did not attract the special six-month limitation imposed by the Public Authorities Protection Act.

Torts

Negligence

It is clear in Canada that a governmental entity, including a school board, may be liable for its negligent act or negligent failure, particularly under the Occupiers Liability Act. Another type of liability, known as breach of a statutory duty, may be created by a statute. Sometimes, a statute can create indirect liability for non-compliance, provided that a breach gives rise to damage which can be treated as evidence of negligence.[21] These principles were tested in a 1999 case where an eighteen-year-old student left school on his motorcycle at lunch hour. Driving too fast out of the school parking lot, the student lost control of the motorcycle, hit a curb, and hit his helmeted-head on a bollard on school property beside the sidewalk. The helmet did not prevent the student from suffering catastrophic injuries. The trial judge held that the accident was caused solely by the student's negligence in driving too fast, as he failed to take reasonable care in operating his motorcycle. The judge refused to find fault on the part of the board with respect to the conditions of the road but did not address the cause of the student's injuries.

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[20] Aboucher v. Ottawa-Carleton French-Language Sch. Bd. (1999) 177 D.L.R. (4th) 68.

[21] *See* Ryan v. City of Victoria (1999) 1 S.C.R. 201.

On further review, the Ontario Court of Appeals upheld the appeal.[22] The court believed that the Occupiers Liability Act imposes an affirmative duty to "take such as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises."[23] The appeal concentrated on the following issue: "in the context of all the circumstances, whether in order to make the school premises reasonably safe for students, the education board should have removed the bollards."

In answering the question in the affirmative, the court analyzed the following important issues: the court contended that the premises were a school and that the Education Act imposes a duty on a board to give assiduous attention to the health and comfort of the pupils as well as the condition of school grounds. The court pointed out that since a board's paramount consideration must be student safety, safety should be a major factor in school design and construction. The court offered that while the board did not consider the bollards a hazard, the question of whether the bollards should have been retained had to be considered in the context of their efficacy. The court was not satisfied that the board considered alternative methods of creating barriers, such as other fencing materials including chains or hedges.

The court enumerated the factors to be taken into account when considering the criteria for reasonable care: the gravity of the potential injury from an accident involving contact with the bollards; that the roadway was curved; that the property was used by teenage students with limited driving experience; and whether it was reasonably foreseeable that a student would fall and hit his head on the bollard. In deciding that the risk of serious injury was reasonably foreseeable if the bollards were not removed, the court did not think that the cost of removal was disproportionate to the dangers that they posed. Therefore, the court allowed the appeal with costs and set aside the earlier judgment.

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[22] Kennedy v. Waterloo County Bd. of Educ. (1999) 175 D.L.R. (4th) 106.
[23] Section 3(1) of the Ontario's Occupiers Liability Act.

Vicarious Liability

Whether an employer of a child-molester should be vicariously liable under strict liability was the question at bar in *Jacobi v. Griffiths.*[24] A trial judge held an employer liable for sexual assaults on two young children because the employee's position allowed him to create the relationships of trust that predicated the attacks. The British Columbia Court of Appeal, allowing the appeal, denied the employer's no-fault liability. The Supreme Court of Canada, by a majority of four to three, dismissed the appeal, writing that the denial of no-fault liability was correctly resolved. The Court remanded the case for trial to examine whether the employer owed the children a duty of care under the fault-based cause of action, whether by negligence or breach of another duty such as the fiduciary duty.

In *Jacobi*, the majority relied on its concurrent and companion case[25] wherein it remarked that the process for resolving, when an unauthorized act is so connected to an employer's enterprise that liability should be imposed, involves a two-step approach. First, it explained that a court should examine precedent to evaluate whether it has unambiguously considered which side of the line between vicarious liability and no liability a case falls. If this search does not lead to a clear answer, the next step is to ask whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. The case law, reflecting policy judgments by various courts over many years and across many different jurisdictions, suggests that imposing no-fault liability would have overshot the existing judicial consensus about appropriate limits of an employer's no-fault liability. The Court reached the same result under the second step of the analysis in which the broader policy rationales are confronted directly. Therefore, the majority held that the British Columbia Court of Appeal correctly denied vicarious no-fault liability. The three-Justice minority would have confirmed the imposition of vicarious liability.

Strict Liability

A rarely used section of the British Columbia School Act provides that "[i]f property of a [School] Board is destroyed, damaged, lost or converted by the intentional or negligent act of a student, the student and the student's parents are jointly and severally liable to the Board in respect of the act of the student." After a 1999 case resolved by the British Columbia Court of

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[24] (1999) 174 D.L.R. (4th) 71.

[25] Bazley v. Curry (1999) 174 D.L.R. (4th) 45.

Appeal, this provision will either be reconsidered by law-makers or will be used frequently. Here, during the Christmas break with some friends, a student at School A drove a stolen vehicle to School B where it was set on fire, causing some $3 million in damage to School B. The board, which owned and operated both schools, sued the student and his parents. The trial judge, although conceding that the student caused the damage by his intentional or negligent act, struck out the board's claim on the basis that the School Act's provision was inapplicable because the student was neither enrolled in the school nor involved in a school activity or educational program when the property was damaged.

On further review, the Court of Appeal reversed in ascertaining that the first rule of statutory interpretation is that the court must deduce the intention of parliament from the words used in the statute. The court reasoned that if there is any ambiguity or if the section of the law is in question or if it is contradicted by or incompatible with any other provision in the statute, then the judiciary may depart from the natural meaning of the words in question. Therefore, the court found that the trial judge erred in not giving effect to the plain meaning of the School Act.

Defamation

Insofar as a defamation action is personal in nature, a group or a class of persons, if defamed, does not have a right to sue unless a person can show that he or she was injured by reference to a group or class to which he or she belonged. This was confirmed by a 1999 case from Ontario involving a teachers' strike. The teachers sought $85 million in damages from the Premier of Ontario based on their claim that he libeled them during a strike when he depicted them as "lawbreakers," thus maliciously damaging the teacher's reputations, even though they admitted that none of them were mentioned by name.[26] The court decided that it was plain and obvious that the broadcasts could not be regarded as capable of referring to one or more of the teachers as individuals since nothing in the broadcasts named, identified, or otherwise singled any one of them out. According to the court, since the test for considering whether references to a group or class of persons failed to identify the complaining teachers individually, their statements of claim should be struck down.[27]

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[26] Coquitlam Sch. Dist. No. 43 v. D (T.W.) (1999) 170 D.L.R. (4th) 107.

[27] Aiken v. Ontario (Premier) (1999) 177 D.L.R. (4th) 489.

Conclusion

Although Canadian society is not as litigious as its southern neighbor, its courts have sufficient work to keep them busy, particularly in deciding novel points of law. The last year of the past millennium was no exception. Nevertheless, since many of the novel points are pending, they will have to be addressed by the Supreme Court of Canada.

ENGLAND AND WALES

Neville Harris

Introduction

In the 1999 edition of The Yearbook of Education Law the author explained some of the main reforms that the Labour government, elected to office in May 1997, was instituting under the School Standards and Framework Act 1998 (the 1998 Act). That Act was the first major education enactment under a Labour government in British history. Insofar as many of the Act's provisions were implemented in 1999, it is necessary to recap some of its key elements to contextualise the analysis below. The Act aimed to set in place a new regulatory regime for ensuring higher standards of education and achievement, to be measured in part by new national targets for pupil attainment in the areas of English and numeracy. New duties have been placed on local education authorities (LEAs) to promote high educational standards and to develop plans (termed "education development plans") for raising standards and improving the performance of schools. LEAs have also been given more onerous responsibilities in the areas of school organisation, admissions, and nursery schooling. At the same time, LEAs have been given powers of intervention in schools that are found to have serious weaknesses or to be failing in specified ways. Meanwhile, the performance of LEAs themselves has been subject to greater scrutiny and potential control by the central administration through powers that enable the Secretary of State to intervene when an authority is failing to perform any of its functions "to an adequate standard (or at all)."

The 1998 Act began the process of limiting class sizes to 30 for children ages 5-7 while establishing a new disciplinary framework to operate within schools, including a duty on head teachers to take measures to prevent bullying among pupils. Further, the Act made changes to the appeal panels dealing with cases involving permanent exclusion of pupils from school and has made provision for attendance targets to be set by governing bodies of schools when the level of unauthorised absences among students in the previous year was at a level defined as excessive under regulations.

As most of these reforms were discussed in depth last year, it is not necessary to analyse them further. It should, nevertheless, be understood that the 1998 Act provided merely a framework for reform and that detailed prescription under regulations and ministerial orders (both types comprising forms of secondary legislation known as "statutory instrument") is necessary. Moreover, in some cases official guidance is effectively part of the legal regime. For example, there is a duty under section 84 of the 1998 Act on LEAs, governing bodies of schools, school admission appeal panels, and the new adjudicators to have regard to a new code on school admissions appeals.[1] Similarly, there is a duty under section 68 of the Act for head teachers, LEAs, and school exclusion appeal panels to have regard to any guidance given from time to time by the Secretary of State in connection with disciplinary powers and procedures. This chapter discusses some of the secondary legislation and guidance introduced over the past twelve months, as the Act alone tells an insufficient story.

The last year of the century also saw an important phase in the still recent development of negligence liability in the context of educative duties. The relevant cases are discussed along with some of the other important court decisions in education law. This entry omits discussions of universities which are the subject of the entry on higher education.

Inclusion not Exclusion

General Policy Developments

The guidance referred to in the introduction illustrates well a dominant theme in some of these reforms. Both the government's policy statement preceding the publication of the draft legislation in 1997/98 and the first report of the government unit established to look at various social problems affecting young people, the Social Exclusion Unit, drew specific attention to the role the education system needs to play in improving the life chances of those from disadvantaged backgrounds who are alienated and/or underachieving and those whom truancy and exclusion from school often precipitate or exacerbate criminal behaviour, future unemployment, and problems in forming long term social relationships. Social exclusion is a problem that the education system is expected to take a dominant role in redressing,[2] as the government has allocated £500 million to support a range of initiatives aimed at reducing truancy and school exclusion. Government officials add that leadership is making an overall "£19 billion investment in education over three years to tackle the problems in our schools and to equip our children to play a full part in society when they grow up."[3] There will, among other things, be a new Youth Support Service in a number of pilot areas from April 2000 "to support schools in reducing exclusion and truancy."[4] Exclusion from school and educational underachievement are disproportionately prevalent among some ethnic minority groups and children with special needs. The government is therefore specifically targeting some of the resources at these groups.

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[1] Department for Education and Employment, School Admissions Appeals Code of Practice (DfEE, 1999), which came into force on 1 September 1999.

[2] Department for Education and Employment, *Excellence in Schools*, Cm 3861 (White Paper) (London: The Stationery Office, 1997), chapter 6; Social Exclusion Unit, *Truancy and School Exclusion*, Cm 3957 (London: The Stationery Office, 1998).

[3] Secretary of State for Social Security, *Opportunity for all. Tackling poverty and social exclusion*, Cm 4445 (The Stationery Office, 1999), p.45.

One of the measures taken to reduce social exclusion is the introduction of "education actions zones" (EAZs). Each zone is established by ministerial order under the School Standards and Framework Act 1998, which governs their operation. The EAZ initiative, including the relevant provisions under the 1998 Act, was outlined in the last Yearbook. EAZs comprise two or more schools, usually based in socially deprived areas. With additional financial support (initially for between three to five years) and a more flexible curriculum, including education-related activities outside normal school hours (which the extra funding aims to meet) and the possibility of more vocationally-oriented courses for older pupils, it is hoped that those groups that traditionally drop out from and underachieve at school will do much better. Moreover, the zones are expected to follow a multi-agency approach, bringing together agencies such as health and social services, crime prevention, careers, and further and higher education. By August 1999, 25 EAZs had been established and a further 47 were under consideration. EAZs represent a unique social and educational experiment within the publicly funded sector of education in England and Wales. The effectiveness of EAZs is yet to be determined.[5]

Inclusion, discussed below, is a concept employed in special education where the law places an emphasis on the education of such children within mainstream schools and classes rather than in separate specialist provision.

The Power of Exclusion from School and Exclusion Appeal Arrangements

Reducing the frequency with which the power of exclusion from school is exercised[6] remains a prime government target. The government has set a target of one-third reduction by 2002.[7] Figures published in June 1999 show that there was only a small fall in the annual number of children permanently excluded from school in England, down to 12,300 in 1997/98 from the record level of 12,700 the previous year. The government has published revised guidance for schools to ensure that the power to exclude is exercised sparingly and only when all other options have been tried.[8] Separate guidance to LEAs aims to ensure that pupils who are excluded are given access to suitable educational provision and returned to mainstream schooling as soon as possible.[9] The guidance also covers the right of parents (or pupils, if aged eighteen or over, see below) to appeal to an independent panel under the 1998 Act. Recent research has shown that the appeal panel system is defective: in particular, the research, based on observation of forty-eight appeal hearings and a wide-ranging survey of parents, LEAs, head teachers, and others, plus a small number of children, suggests the system does not operate fairly, particularly in its unskillful handling of child witnesses and its overall unwillingness to question cases for exclusion with sufficient stringency. One of the recommendations of the research is that exclusion appeal panels should be chaired by lawyers, or alternatively, that this jurisdiction should be transferred to the Special Educational Needs Tribunal, which has lawyer chairmen, generally operates fairly, and has been found to adopt the correct judicial approach.[10] Challenges to school exclusion have continued in the courts over the past year (see below).

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[4] Id., p.52.

[5] For a review of the EAZ system, see S. Billington, "Education Action Zones - A Progress Report" (2000) 1 Ed Law Jnl 9-12.

[6] The power is contained in s. 64 of the School Standards and Framework Act 1998 and is exercisable only by the head teacher: see further Neville Harris and Karen Eden, with Ann Blair, *Challenges to School Exclusion* (London: Falmer Press, 2000).

[7] H.M. Government, *United Nations Convention on the Rights of the Child, Second report by the United Kingdom* (London: The Stationery Office, 1999) para. 9.27.3.

One of the issues highlighted by the exclusion appeals research was the way that a child or young person is deprived of independent remedial (or process) rights. A child or young person is not classed as a party to the appeal unless aged eighteen or over,[11] nor has a specific right under the statute to attend and address the appeal panel. The courts have nevertheless stressed the fairness, in terms of natural justice, in a panel hearing directly from the child or young person.[12] Under the statutory guidance, this has been left to the discretion of the panel, although the revised guidance published in July 1999 advises that a panel should only refuse to hear from the child in person if there is a "good reason to refuse."[13]

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[8] Department for Education and Employment, Circular 10/99, Social Inclusion: Pupil Support (DfEE, 1999).

[9] Department for Education and Employment, Circular 11/99, Social Inclusion: the LEA role in Pupil Support (DfEE, 1999).

[10] See N. Harris, *Special Educational Needs and Access to Justice* (Bristol: Jordans, 1997).

[11] A mere 6 of the 12,700 pupils who were permanently excluded from a school in England in 1997/98 were aged 18 or over and therefore had an independent right of appeal: Department for Education and Employment, Permanent Exclusions from Schools in England 1997/98 and Exclusion Appeals Lodged by Parents in England 1997/98 (London: DfEE, 1999).

[12] eg R v. Governors of St Gregory's RC Aided High School and Appeals Committee *ex parte* M [1995] E.L.R. 290.

[13] Circular 10/99 (Annex D), above n. 9, para 29.

Excluding the Rights of the Child

In the past, the UK government has been criticised by the UN Committee on the rights of the child because, in relation to various matters, including exclusion from school, "the child is not systematically invited to express his/her opinion and those opinions may not be given due weight, as required under article 12 of the [UN] Convention [on the Rights of the Child]."[14]

It is noteworthy that while the government is beginning to recognise the value of involving children collectively in education policy making, at least by consulting them, whether at the national, local, or school level,[15] there remains a resistance to giving them independent individual rights in education. The continuing assumption is that the child's rights can most appropriately be recognised and safeguarded through parental rights. Yet, such an overwhelmingly paternalistic approach is out of step with a more general trend in English social law[16] that seeks to balance the protective role of parents with recognition of the increasing autonomy of the child as he or she advances in age.[17] In its second monitoring report on the implementation of the UN Convention on the Rights of the Child, published in August 1999, the government expressed its support for the participation of children individually (as persons from whom it would often be "appropriate" for a school discipline committee or the independent appeal panel to hear) or collectively (as persons whose involvement in helping to draw up a school's discipline policy would be "important").[18] The report did not promise the introduction of any new rights for children or young people in this context.

There has recently been a move towards including the rights of the child within education in Scotland. Although the author's self-imposed remit extends to England and Wales only, it is important to reflect on the developments in Scotland because they could well presage reform in England and Wales, especially in the light of the current impetus toward a rights framework for public welfare provision given by the Human Rights Act 1988 (which will, in effect, incorporate the European Convention on Human Rights and Fundamental Freedoms 1950 into national law from October 2000[19]). Scotland has always had its own legislative framework for education under statutes enacted by the UK Parliament. Devolution of statute-making powers to a new Scottish Parliament has occurred as a result of the Scotland Act 1998. Executive authority in Scotland in respect of devolved government activities such as education is exercised by the Scottish Executive. In a recent report based on a widespread consultation by interested parties, including children and young people,[20] the Executive has expressed an intent to amend draft education legislation (the Standards in Scotland's Schools Bill) currently before the Scottish Parliament in order to establish a children's rights framework for education. This framework is based around the education rights contained within the UN Convention on the Rights of the Child. Thus, for example, instead of simply referring to the duty of school authorities to provide educational facilities (as is also the case under the Education Act 1996 in England and Wales), the law in Scotland will state that it is "the right of every child of school age to be provided with school education by, or by virtue of arrangements made by, an education authority." This approach mirrors the child's right to education in Article 28 of the UN Convention, while another new provision setting out the aims of education (the development of the child's personality, talents, and mental and physical abilities) reflects the content of Article 29.

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[14] Committee on the Rights of the Child, Report on the Eighth Session (CRC/C/38), Geneva, 9-27 January 1995, para 216.

[15] See N. Harris, 'Education Law: Excluding the Child' (2000) 12 *Education and the Law* (in press). G. Lansdown, 'The Government's Second Report to the Committee on the Rights of the Child' (2000) 12(4) *Representing Children* 263-270.

[16] In particular, in the Children Act 1989.

[17] See generally J. Fortin, *Children's Rights. The developing law* (London: Butterworths, 1998) and A. Bainham, *Children: the Modern Law*, 2nd edition (Bristol: Jordans, 1998).

[18] H.M. government, *United Nations Convention on the Rights of the Child, Second report by the United Kingdom* (London: The Stationery Office, 1999) paras. 9.27.1 and 9.33.4.

It is highly significant is that there will be a new duty to consult children and young people as part of the process of setting local educational objectives and preparing school development plans. This is broadly in line with Article 12 of the Convention (the child's right to participate in decisions about matters affecting him or her) even though it will be limited in scope and effect. What is perhaps a little surprising is that the Scottish Executive has not accepted the view that all children and young people should have an independent right of appeal against their exclusion from school. However, it has gone further in this regard than the UK Parliament by agreeing to give legal effect (via regulations) to current guidance that before any decision to exclude a child as well as during the process of appeal, the view of the child or young person in question, should be ascertained and taken into account.

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[19] It is already in force in Scotland.

[20] *Improving Our Schools - the Consultation* (The Scottish Executive, 2000). The consultation with children was conducted by Save the Children.

The Social Context to Exclusion from School

The rate of permanent exclusion from schools is ten times higher in England than in Scotland.[21] The exclusion statistics also continue to show that black children are over- represented among those permanently excluded from school in England. In particular, the official statistics published in June 1999 show that Black Caribbean pupils are four times as likely to be excluded than white children. The government has an expressed a commitment not only to put pressure on schools and LEAs to reduce the numbers of black children who are excluded, but also to improve the educational prospects of ethnic minority pupils, especially those groups among which levels of underachievement are high.[22] The government has allocated additional resources to support the particular needs of children for whom English is not a first language. The Macpherson report,[23] published in 1999, following a long inquiry established by the Home Secretary into the police investigation of the murder of a black teenager in London, referred to the exclusion of black children from school as part of a wider problem surrounding "institutional racism" in many areas of public activity. The report reinforced the message that the education system has a major role to play in combating racism.

Challenges to Exclusion in the Courts

As in 1998, the courts heard a number of exclusion cases last year. In R v. Board of Governors of Bryn Elian School ex parte Whippe,[24] the court scrutinized the procedure leading separate decisions to exclude two sisters from school for acts of misbehaviour. The court was clearly mindful of the importance of due process and of the need for the head teacher, who alone has the power under statute to exclude a child from school, to consider matters such as the child's previous record of good behaviour and any other mitigating factors. The court believed that the head teacher and, in turn, the discipline committee and the appeal panel, had approached the matter in the correct way. In R v. Incorporated Froebal Institute ex parte L,[25] a thirteen year-old pupil had been accused of various acts of misconduct, including theft from other pupils or a newsagent or a hotel on a school trip abroad. He was excluded from school and his appeal to the exclusion appeal panel was dismissed on the ground that the punishment was not too severe. The appeal panel regarded the boy's schoolwork record and general character as irrelevant. An application was made for judicial review and an interim injunction was sought, requiring the school to re-admit the boy. The injunction was granted but when the full application for leave to apply for judicial review came before the court, it reasoned that this was not a case amenable to judicial review because that procedure is only available in respect of the acts of public bodies, such as state-maintained schools, and this was a private school. The matter then proceeded under contract law, seeking an order of specific performance of the contract between the parents and the school. Applying established principles relating to the equitable remedies in contract cases, the court ruled that specific performance would not be appropriate for situations involving personal interaction as in a pastoral or educational relationship, particularly where trust in that relationship had broken down.

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[21] C. Howarth *et al.*, *Monitoring poverty and social exclusion 1999* (York: Joseph Rowntree Foundation), p.34.

[22] See Secretary of State for Education, *Excellence in Schools* Cm 3681 (London: The Stationery Office, 1997).

[23] Sir W. Macpherson, *The Stephen Lawrence Inquiry: Report* Cm 4262-I (London: The Stationery Office, 1999).

[24] [1999] E.L.R. 380.

[25] [1999] E.L.R. 488.

Negligence in the Performance of Educative Duties

There have been continuing developments in English courts over the liability of educational professionals for negligence in the performance of educative duties. As noted in last year's chapter, the door to litigation in this area was opened up by the House of Lords (in its judicial capacity) in X. v Bedfordshire County Council (Etc).[26] In addition, last year's chapter reported on the Court of Appeal's decision in Phelps. v London Borough of Hillingdon,[27] a case filed by a young woman who alleged that her educational and career underachievement as well as her psychological problems of low self-esteem and lack of self-confidence stemmed from a failure by the LEA's educational psychologist to diagnose her dyslexia when she was a pupil. It will be recalled that the Court of Appeal overturned a damages award[28] totaling approximately £45,000 on the ground (inter alia) that the psychologist owed a duty to the local education authority but not to the parents or the child. The court was influenced by the policy approach of United States courts in educational malpractice cases.

Some educational lawyers regarded Phelps as effectively shutting the door on educational malpractice claims. However, others continued to believe the very clear and apparently unequivocal statement by Lord Browne

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[26] [1995] E.L.R. 404.
[27] [1998] E.L.R. 38.
[28] [1998] E.L.R. 38.

Wilkinson in X that head teachers and others who fail to respond appropriately to an underachieving pupil could be liable because a school that accepts a pupil assumes responsibility not only for the student's physical well-being but also for his or her educational needs. He added that since the education of the pupil is the very purpose for which a child goes to school, the head teacher, being responsible for the school, comes under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs.[29]

In X, the court nevertheless drew a distinction between decisions or actions taken in the exercise of "statutory discretions" (i.e., those taken in the specific exercise of a statutory power), which were non-justiciable, and those which arose out of ordinary professional duties where a failure of duty was justiciable. This distinction was considered by the House of Lords in Barrett v. Enfield London Borough Council in 1999.[30] Although not an education case, it had a bearing on the subsequent development of education law. In Barrett, where a child was in the care of the local authority, it was alleged on his behalf that he suffered psychologically and in other ways due to the local authority's failure to place him with adopters or in a foster home or to secure his reinstatement with his mother. The House of Lords did not regard the local authority's action as necessarily non-justiciable simply because it was taken in the exercise of the statutory discretion of the authority. It was necessary in determining whether a duty of care arose and was broken to look at the overall context in terms of the local authority's statutory functions in relation to services for such children.

The relevance of this approach to education cases became clear in Gower v. London Borough of Bromley in July 1999.[31] Here, a boy (age sixteen at the time of the suit) suffered from a form of muscular dystrophy, a degenerative condition that affected his speech and movement but not his intelligence. Because education was crucial in helping to maintain the boy's communication skills, the use of a computer was vital. His claim was that the head teacher and other staff at his school were professionally incompetent and did not provide him with the computer training aids necessary to enable him to communicate adequately for learning or socializing with his fellow pupils. He claimed that he consequently failed educationally and suffered other damages, including clinical depression. Writing for the court, Auld,

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[29] Note 28, at p.451A-B.

[30] [1999] 3 W.L.R. 79.

[31] [1999] E.L.R. 356.

L.J., cited the part of Lord Browne Wilkinson's judgment in X and held that his words were capable of a broad application: "they are . . . capable of applying in an appropriate case to a head teacher's and his teaching staff's duty to teach and otherwise meet the needs of the pupils in their charge"[32] He observed that he read the House of Lords' judgment in Barrett as meaning that Lord Browne Wilkinson's opinion in X was "generally applicable to 'operational' negligence of teachers and others in the exercise of their professional responsibilities to children in their charge."[33] Applying ordinary principles of tort law,[34] Auld, L.J., was satisfied that it was "plainly foreseeable by a head teacher and his staff that if they do not properly teach or otherwise provide for a pupil's educational needs he may suffer educationally and, in circumstances such as those alleged here, psychologically." The case was referred back to the High Court for a determination of liability on the facts.

More recently, in Jarvis v. Hampshire County Council[35] the question of the alleged negligence of an educational psychologist arose again in a case similar to Phelps. It was claimed that negligence had led to the inappropriate school placement of a child with dyslexia. The Court of Appeal resolved the question of the LEA's vicarious liability for the psychologist's alleged failure on a similar basis to Phelps, declaring that the psychologist was employed to advise the LEA in the exercise of its statutory functions rather than to provide a service to the public, giving rise to a duty of care. The court added that there could not be a sustainable claim for economic loss arising from the failure to diagnose dyslexia when there had not been the necessary assumption of responsibility.

In Gower, Auld, L.J., commented that it was "an error" to rely on Phelps "as an authority for the proposition that a LEA could not be responsible for the quality of education that its teachers provided."[36] This was not at issue in Jarvis, so no matter how Gower is decided in the High Court on the question of actual liability, the door seems to remain open for potential negligence claims in respect of teachers' ordinary educative duties, which might include disciplinary as well as standard pedagogical functions. Moreover, it is possible that the limitation set by the House of Lords in X over the non-justiciability of actions or decisions of LEAs or their employees in the exercise of "statutory discretions" might require reconsideration in light of a report of the European Commission of Human Rights in Z and Others v. United Kingdom[37] and Osman v. United Kingdom.[38] If that limitation is regarded as giving rise to immunity from suit, then when a court strikes out a claim for having no cause, it is thereby depriving a person of a hearing for "the determination of his civil rights and obligations," in breach of Article 6(1) of the European Convention on Human Rights 1950. Jarvis, Morritt, L.J., considered that Z and Osman did not compel the court to depart from the principle laid down in X. When an appeal in Phelps is heard by the House of Lords later this year, it seems highly likely that the effect of Osman, read with Z, will receive further, and welcome, judicial consideration. This appeal will be decided in combination with one by the London Borough of Bromley in Gower and by Clwyd County Council in Anderton,[39] discussed in last year's Yearbook.

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[32] Ibid., at p. 360D.

[33] Ibid. at p. 360E.

[34] See in particular Caparo Industries plc v. Dickman [1990] 2 AC 605.

[35] [2000] E.L.R. 36.

[36] At 362G-H.

Securing a School Place: Parental Choice

The new legislative framework relating to school admissions and the organization of school places has begun to be implemented, and the process will continue through 2000. As this was discussed in some detail in last year's Yearbook, the only legislative developments of note are the promulgation of the various sets of regulations fleshing out the statutory requirements.[40] There have, however, been some important court decisions touching upon some of the established principles in this area and also on the new "adjudicator" system.

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[37] Application No. 29392/95.

[38] [1999] 1 F.L.R. 193.

[39] [1999] E.L.R. 1.

[40] For example: the Education (School Government) (England) Regulations 1999 (S.I. 1999 No. 2163) (and the equivalent regulations in Wales: S.I. 1999 No. 2242), requiring voluntary aided and foundation schools to have an "admissions committee" to decide on admissions (in most other schools this is a function of the LEA); the Education (Objection to Admission Arrangements) Regulations 1999 (S.I. 1999 No. 125); the Education (Determination of Admission Arrangements) 1999 (S.I. 1999 No. 126); the Education (School Organisation Committees) (England) Regulations 1999 (S.I. 1999 No. 700); and so on.

Adjudicators

One aspect of the new framework is the "adjudicator" system. The adjudicator's role under the 1998 Act is to determine disagreements or disputes about school organization plans (in which the LEA sets out how it will provide education to meet the needs of the local population),[41] the arrangements for admissions to schools in an area, and decisions over the establishment, alteration, or closure of a school. In 1999, two cases challenged decisions by the adjudicators in Wirral and Wandsworth respectively.[42] In the Wirral case, the court denied an LEA's application for judicial review. The court decreed that the adjudicator did not act unreasonably in classing as unfair and overruling the admission arrangements in question, under which a child who did not get into the selected school because it was oversubscribed was then put to the top of the list for his parents' second choice school. In the Wandsworth case, the adjudicator ordered that the proportion of children selected for three schools on the basis of their ability ("partial selection") should be reduced from up to 50% to 25%. Sullivan, J., concluded that the adjudicator exceeded his powers in relation to one of the schools in question, and that in relation to the others, the matter should not have been referred.

Individual Admission Decisions

Under the 1998 Act, parents have a right to express a preference for a school for their child(ren) and to appeal if their choice is denied.[43] Disparities in the quality of provision in schools undoubtedly raises the importance of school choice for many parents. Appeal against a denial of preference goes to an appeal committee of three or five persons constituted under the Act. Normally, a court will not entertain an application for judicial review when a child is denied admission to a school unless and until the dispute has been addressed by an appeal committee. Consequently, many applications for judicial review take the form of challenges to decisions made by appeal committees. However, where allegations are raised that admission policies or arrangements are unfair, irrational, or generally unreasonable (in the judicially defined sense of the word),[44] judicial review is possible because it would not be a matter for the appeal committee. Of course, in some cases the allegedly unlawful policy will have formed the basis for the appeal committee's action, thereby calling that decision into question.

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[41] School Standards and Framework Act 1998, s. 26 and the Education (School Organisation Plans) (Wales) Regulations 1999 (S.I. 1999 No. 499) and [the same] (England) Regulations 1999 (S.I. 1999 No. 701).

[42] These are as yet unreported. A transcript of the Wandsworth judgment is now available: R v. Downes ex parte Wandsworth London Borough Council, 14 January 2000. For discussion, see the note by Anne Ruff in [2000] 1 *Ed Law Jnl* 4-5.

[43] Sections 86 and 94, but there is no right of appeal where a child has been permanently excluded from school twice or more, if the most/more recent exclusion occurred within the previous two years: see sections 87 and 95.

Recent cases include Rotherham Metropolitan Borough Council ex parte LT, VC and MK.[45] Three sets of parents who lived in the Nottingham area applied for their children to be admitted to school across the LEA boundary, in Rotherham. According to the relevant statutory provisions,[46] parents living within and outside a county area were, all other things being equal, to be granted an equal chance of securing a place at a particular school. In other words, there should be no discrimination by the admissions authority against parents simply because they live outside the LEA area in which the school was located.[47] Nevertheless, because of zone systems (called, in England and Wales, school "catchment areas"), parents living outside an LEA area can lose out because they might not live in the school's zone. It is not unlawful for an admissions policy to give priority to children living within the school's zone.[48] Such priority is important where a school is oversubscribed, as was the case in Rotherham. The three children were refused places because insofar as they did not live in the zone, they had a lower priority than those who did. The parents applied for judicial review of the admissions policy on the ground that the zone system automatically and arbitrarily excluded those who might be more proximate to the school than those who were within the zone. The parents further asserted that the zone system breached the non-discrimination rule concerning persons living inside and outside the boundary of an LEA. Owen, J., rejected these arguments, finding that the zone system was lawful, and that the reason the children did not have the priority desired was because they lived outside the zone, not specifically because they lived outside the LEA's area. As such, he wrote that the remedy was a matter for the discretion of the court. Owen, J., noted that even if he had found in favor of the parents, he would not have been likely to quash the LEA's decisions because to undo all of the selections for the school in question would have caused chaos for administrators, children, and parents alike.

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[44] Namely, that the decision maker acted in a way in which no other reasonable decision maker would be likely to act in that situation: Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223; Secretary of State for Education and Science v. Tameside MBC [1977] A.C. 1014.

[45] [1999] E.L.R. 500.

[46] Now s. 86 of the 1998 Act, replicating s. 411 of the Education Act 1996 which consolidated s. 6 of the Education Act 1980.

[47] See, in particular, *R v. Shadow Education Committee of Greenwich London Borough* ex parte *the Governors of John Ball Primary School and Others* (1989) 88 L.G.R. 589 and *R v. Wiltshire County Council* ex parte *Razazan* [1997] E.L.R. 370.

[48] Ibid.

One issue that had not come up for judicial consideration until recently is whether an admission appeal committee is entitled to take account of the availability of places at other schools in an area when deciding whether a child should be admitted. In R v. Education Committee of Blackpool Borough Council ex parte Taylor,[49] the appeal committee denied a child a place at the preferred school (which was oversubscribed) on the statutory ground that admission would "prejudice efficient education or the efficient use of resources."[50] The parents claimed that while the appeal committee was entitled to consider evidence as to the potential impact on the school of admitting their child when it was already overcrowded, it was not entitled to take account of the availability of school places elsewhere because that information was not relevant to the statutory ground for refusing a place. Somewhat surprisingly, the court agreed with the appeal committee that the resources available elsewhere (in other words, the places at alternative schools) were probably a relevant consideration. Kay, J., granted leave to bring the full application for judicial review to the court.

Perhaps the most important admissions case in 1999 was R v. Sheffield City Council ex parte H and Another.[51] Here, parents successfully applied for judicial review of a decision, upheld by the appeal committee, not to admit their children to their preferred school. The parents argued that the LEA's admissions arrangements were unlawful because they did not permit parents who had automatically been allocated a place at a particular school, but who preferred a different one, to give reasons for their preference. Owen, J., ruled that a court could strike down the appeal committee's decision if (as here) it was tainted with illegality. The LEA then appealed to the Court of Appeal.[52] In a majority decision, the court maintained that the appeal committee could consider the question of the lawfulness of the LEA's admission arrangements: "An appeal committee is not obliged to treat those arrangements as set in stone and beyond challenge."[53] In his dissenting judgment, Laws, L.J., argued that this would give appeal committees a power akin to judicial review. However, Peter Gibson, L.J., said that nothing in the statute established the remit of the appeal committee to suggest that a restriction should apply to the ground of the appeal or the nature of the representations which could be brought before it. The fact that there is no requirement for these panels to have a lawyer member gives this author some sympathy with Laws, L.J.'s, views.

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[49] [1999] E.L.R. 237.

[50] 1998 Act s.86(3)(a).

[51] [1999] E.L.R. 242.

[52] [1999] E.L.R. 511

[53] *per* Pill, L.J., at 523C-D.

Special Educational Needs

In 1999, there were more legal actions concerning the education of children with special educational needs than on any other educational issue. This is not perhaps all that surprising in view of the existence of an express right of appeal from a ruling of a Special Educational Needs Tribunal through to the High Court on a point of law. Only a very brief résumé of the litigation last year is possible here. A number of the cases have centered on technical, procedural points. This section concentrates on cases involving important issues of substance as regards the application of the law.

To aid contextual understanding of the effects of the cases, it is necessary to summarize the key features of the legislation. As can be seen from discussion below, the law is very complex. The law is contained in Part IV of the Education Act 1996 and in two sets of regulations.[54] In addition, practice in this field is constrained by the requirement to have regard to the statutory code of practice published by the Department for Education.[55] Special educational needs exist where a child has "a significantly greater difficulty in learning than the majority of children of his age" or has a disability hindering or preventing his or her use of standard educational facilities in the area.[56] Conditions such as blindness, autism, dyslexia, and speech problems clearly give rise to special educational needs. Approximately one in five children is considered to have special educational needs for the purposes of this definition. The law provides that unless it would prejudice their own needs, the education of other children, or the efficient use of resources, students with special needs should be educated in a mainstream school alongside other pupils[57] in a manner similar to the American practice of full inclusion.

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[54] The Education (Special Educational Needs) Regulations 1994 (S.I. 1994 No. 1047) and the Special Educational Needs Tribunal Regulations 1995 (S.I. 1995 No. 3113).

[55] *The Identification and Assessment of Special Educational Needs* (1994).

[56] Education Act 1996, s.312. A child under five has special educational needs if he is likely to satisfy this test, or would do if special educational provision were not made for him when over that age.

[57] Education Act 1996, s. 316.

Once identified, a child with special educational needs must have his or her needs met by a local school. LEAs have a general responsibility to ensure that provision is made. For a minority of children, a formal assessment of needs is required. The law requires an LEA to organize an assessment of its own initiative or on the request of a parent when it considers one necessary.[58] Following an assessment, an LEA must decide whether a child's needs and the provision required to meet them should be specified in a "statement" similar to an American Individualized Education Program. The significance of a statement is that once it is made, an LEA must ensure that the child's needs are fully met and the specified provision is delivered. As the budgets devolved by LEAs to individual schools do not normally include funding for a specialist statemented provision, a general rule of thumb is that a statement should be made only when a school cannot meet a child's needs out of its own devolved budget. However, the strict legal test is again one of necessity. LEAs will normally retain funds to meet statemented provision and, as noted last year, it is difficult for them to ration those funds when a statemented provision would be cut.

A statement must be in the prescribed form and must distinguish between "educational" and "non-educational" needs. While an LEA has a duty to ensure that a specified special educational provision is made, it is not required to arrange "non-educational provision."[59] The distinction between these two categories is therefore important. Last year the High Court and then the Court of Appeal considered this matter in London Borough of Bromley v. Special Educational Needs Tribunal and Others.[60] Here, a twelve-year-old child, S, had physical disabilities which meant that he could not walk, sit, or stand. S was totally reliant on adults for all his mobility needs, dressing, washing, toileting, and feeding. S lived in a social services home and attended a special school maintained by the LEA (school R). S's parents wanted him to be placed at a specialist independent residential school (school C), at an extra cost to the LEA of £20,000 per annum. The parents argued that S's needs for physiotherapy, occupational therapy, and speech therapy were all educational and should have been reflected in his statement. The tribunal agreed that since S's needs were not being met, he should be placed at C school. The High Court dismissed the LEA's appeal, which then sought further review from the Court of Appeal. The Court of Appeal upheld the judgments of both the tribunal and the High Court apart from the amendment of the statement; the court was of the opinion that the statement as a whole sufficiently set out the needs and provision required. Lord Justice

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[58] Ibid., ss 323, 328, 329 and 331.

[59] Ibid., s 324(5).

[60] [1999] E.L.R. 260.

Sedley provided some important guidance on the distinction between "educational" and "non-educational" provision[61] in rejecting the idea of a "sharp dichotomy" between the two. Rather, he accepted that there was a shared territory of provision which can intelligibly be allocated to either.

In Bromley, the court did not discover anything irrational in the tribunal's finding that physiotherapy, occupational therapy, and speech therapy might at least in part be an educational need. However, Sedley, L.J., accepted that there could easily be a difference of opinion on such a matter. He wrote that while such uncertainty was "less than ideal," it was "an intelligible choice on Parliament's part where the alternative is a rigid categorisation productive of far more doubt, dispute and litigation than what I would hold to be the method of Parliament's choice."[62]

In R v. Portsmouth City Council ex parte Faludy,[63] the courts held that an LEA's duty to make special educational provision for a child or young person did not extend to funding his or her attendance at a university. This case concerned an intellectually gifted child who, at the age of fifteen, won a place at Cambridge University. The court held that because the Education Act 1996 states that "nothing in this Act confers any functions with respect to higher education" (s 1(4)), Part IV of the Act (concerning special educational needs) could not apply in respect of a person's attendance at a university.

Many of the cases on special educational needs continue to address the question of placement. The choice of school that a child should attend is a frequent cause of dispute between LEAs and parents. Often, as in Bromley, the principle reason for an LEA's resistance to parental choice is cost. Yet, parents have a right under Schedule 27 to the 1996 Act to express a preference for a school to be named in a statement (which means that the school must admit the child and the LEA must fund his or her attendance), but that choice can be denied where it would be unsuitable (in view of the student's age, ability, aptitude, or special educational needs) or where his or her attendance there would "be incompatible with the provision of efficient education for the child with whom he would be educated or the efficient use of resources." Schedule 27 only applies to the selection of a school in the state sector. Parents who want an independent (private) school to be named in a statement (which is often the case, as there are many specialist independent schools with excellent facilities for children with particular kinds of difficulties such as autism, hyperactivity, hearing impairment, and dyslexia), cannot rely on the Schedule. Instead, they will be forced to rely on section

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[61] Ibid., at 295E-296A.

[62] Ibid., at 296E.

[63] [1999] E.L.R. 115.

9 of the Act. This lays down a general principle, not in any way restricted to special educational needs cases, that "children are to be educated in accordance with the wishes of their parents," provided that doing so is compatible with the provision of "efficient instruction and the avoidance of unreasonable public expenditure."

Last year, in C v. Buckinghamshire County Council and the Special Educational Needs Tribunal,[64] the Court of Appeal confirmed that the rights in section 9, while not as potent as those in Schedule 27, did require an LEA to take account of parental wishes when they selected an independent school. However, Sedley, L.J., declared that this did not mean that parental wishes should prevail where a tribunal considered the school selected by the LEA to be markedly more suitable for the child. Subsequently, in W-R v. Solihull Metropolitan Borough Council and Wall, Latham, J., offered that a tribunal, having weighed the merits of the two options (one of which involved a placement at an independent school chosen by the parent), was entitled to regard "the mere fact that the appellant preferred Sunfield School [as] of little significance."[65] Another court adopted a similar approach in S and S v. Bracknell Forest Borough Council and the Special Educational Needs Tribunal[66] where a five-year-old autistic boy had recently started to attend a special centre that provided the Lovaas programme that his parents had to pay for. When the parents wanted the centre to be the specified placement named in his statement, the LEA selected a different school and the tribunal agreed with the LEA's choice. One of the parent's grounds for appeal to the High Court was that the tribunal failed to apply the principle in section 9 of the 1996 Act. Scott Baker, J., ruled that section 9 only came into play in the event of equal alternatives for meeting the child's needs. The tribunal had formed a view, on the facts, that the Lovaas programme should be considered with caution, and because the school preferred by the LEA, which offered regular speech and language therapy, would have been effective, it was an appropriate placement. The court added that it was not necessary for section 9 to be applied where the LEA's preferred option was clearly considered the better of the two. Even so, it should be noted that nothing in C v. Buckinghamshire suggests that parental wishes under section 9 should not be considered when, though both schools could make adequate provision, the school selected by the LEA seems the better option. Indeed, in this case the court acknowledged that the tribunal erred in not considering parental wishes under section 9, although it concluded that the tribunal's error did not prejudice its action.

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[64] [1999] E.L.R. 179.
[65] [1999] E.L.R. 528, at 534D-E.
[66] [1999] E.L.R. 51.

Conclusion

Aside from the fact that most of the changes made by the School Standards and Framework Act 1998, discussed in the previous Yearbook, were implemented in 1999, last year saw few new legal developments in education. This was largely because there was no new education statute. At the same time, there were important developments in the common law in the area of negligence in the performance of educative duties. The House of Lords' forthcoming ruling in Phelps, Gower and Anderton could also precipitate a flood of further cases, depending on which way they are decided. During 1999 there were further disputes over the exercise of statutory powers and duties in fields such as the allocation of school places, exclusion from school, and special educational needs, comparable with the scale of litigation in previous years.

Education lawyers are preparing themselves for an anticipated upsurge in litigation when the Human Rights Act 1998 is implemented in October 2000, making the provisions of the European Convention on Human Rights and Fundamental Freedoms justiciable (in relation to existing legal duties) before English courts. The initial experience of the Act's operation will doubtless be covered in the next Yearbook. Also occurring in 2000 will be reforms to the special educational needs appeal system, aimed in particular at streamlining procedures, enabling more account to be taken of the wishes and feelings of the child, and speeding up the implementation of tribunal decisions by the LEAs affected by them. Draft guidance has been issued on resolving disputes over special educational needs matters through conciliation, which, if confirmed, could result in fewer appeal cases. Also expected in 2000 is the revised statutory code of practice on special educational needs, which will have considerable practical implications. Moreover, the Learning and Skills Bill will reach the statute book, reforming post-sixteen education with a view to improving the take-up or continuation of education among that age group and helping to fill the "skills gap" caused by failing to maximise the education and training of young people. Above all, as the Labour government enters it fourth year in office, there will be an increasing assessment of the extent of progress toward the national and local targets set for educational improvement and reduced exclusion. Although much of public attention will continue to be placed on policy initiatives, the law will remain an important underlying force in relation to the impact of qualitative goals in individual cases.

EUROPEAN EDUCATION LAW

Prof. Dr. Jan De Groof
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Introduction

When the founding fathers of Europe, now more than four decades ago, signed the Rome Convention establishing the European Economic Community (EEC), they had a clear vision in mind: a European *Economic* Community. While some visionary thinkers considered it to be the stepping stone for a European integration of far greater consequences, the intent of the Convention remained for a long time restricted to a primarily economic aspect.[1] The Customs Union, the free movement of goods, capital and payments, and agricultural and monetary policies, was unmistakably of an economic nature. Even the free movement of individuals was strictly bound to the exercise of an economic activity, either in the capacities of employed workers or self-employed people. Given that focus, it was not surprising that education initially barely rated a consideration in the Convention, and when it did, it was solely to have a direct economic significance.[2] It was only through the extensive interpretation of the term "Vocational Training" by the European Court of Justice, the European education programs aimed at student and teacher mobility, and the European Credit Transfer System that a European sphere of competence in the field of education was gradually created.

The Maastricht Treaty changed this emphasis by assigning education a clear position. In the Treaty of Amsterdam, access to education and its continuing reforms was explicitly described as the stepping-stone to reaching the highest possible level of knowledge for the peoples of the Community. With this, a clear signal was given for the further development of a true European education policy.

This chapter elucidates the competences of the Community in Education by studying the mobility of and access to education by students and teachers, access that is not possible without recognition and mutual confidence in the degrees and certifications issued by other member states. Two sections are devoted to the financing of study programs and the right of residence for the student. Finally, numerous initiatives are reviewed that have been undertaken by the commission in order to strengthen integration via education and to allot to educational policy its unmistakable place of significance on the European plane.

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[1] KAPTYN P. en VERLOREN VAN THEMAAT , P.,"*Introduction to the law of the European Communities after Maastricht,*" Deventer, 1995, p. 147.

[2] DE GROOF, J.,"Perspectives for the international law on education," *T.O.R.B.*, 1993-1994, p. 105 en OONK, G., *Guidebook: Europe and Education*, Alkmaar, European Platform for education in the Netherlands, 1997, p. 122.

Definition of the Concept of Education

Education

Commentaries on constitutions criticise the ambiguity of the term "education," especially from the aspect of whether it includes "training." Many National Education Policy Bills establish some clarity and define education as "... education and training provided by an educational institution, other than training as defined in the Manpower Training Act." Yet, there isno reason for limiting the term in any way. Other rules give a surprisingly wide reading of the concept. Many constitutions still contain a traditional definition of education as regular education provided on the levels of basic, secondary, and higher education and, despite the modern evolution of concept-forming, contain no reference to adult basic education or to further education. Several Constitutions do not restrict themselves to such a traditional view. The need for both permanent training and adult basic education is a reality in any society, in whatever region of the world, but the stringent character of adult basic education specifically makes itself strongly felt in central east countries in Europe.

The international legal norm concerning education[3] also offers an all too limited interpretation. Education is also defined by jurisprudence in a very classic manner: "... the education of children is the whole process whereby in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development."[4] Jurisprudence refers in particular to the forms of regular education for young people and emphasizes "elementary" or "primary" education in an examination of Art. 2 of the Supplementary protocol to the European Convention on Human Rights.[5]

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[3] For this see the schematic overview in DE GROOF, J. & BRAY, E., Education under the new constitution in South Africa, Acco, Leuven, 1996.

[4] E.T.H.R. in the case of Campbell and Cosans, 25 February 1982, *Eur. Court Publ.*, Series A, vol. 48.

[5] At least as regards the viewpoint of the European Human Rights Commission in several dossiers. We will not discuss this further at this time.

Although the phrase "everyone has the right" [to education] accepts no limitation in the sphere of application, whatever the age and level of development, greater precision in such a legal prescription should be welcomed as the emphasis of the legislators for guaranteeing provisions for people who lacked the opportunity to acquire any basic training. It makes an undeniable priority of the right to education and the fulfilment of this right by the government more than a mere moral obligation. The terms "basic" education, "higher" education, and "adult" education ought to be understood in their generally accepted definitions. In the legal doctrine, the attitude has been formulated according to which it is a question of "flexible concepts." There is no need, however, to go along with this view.

Vocational Training

Vocational training constitutes another priority policy domain for Eastern Europe. "Vocational training" forms part of the structure of "education." From the very beginning, "education" has included three constituents of training that can only be separated from each other artificially, while only their mutual relationship can guarantee a coherent policy. "Vocational training," for example, frequently encompasses personality development and social skills. The terms used in the *Treaty on European Union* are nevertheless far from clear. Possible differences of interpretation could have been avoided by giving a definition of both terms. The position adopted in this constitution is that the Treaty does not pass over the view adopted by the Court of Justice without making any changes[6].

In order to express the right to education, texts of international treaties[7] often use the French term "instruction" in contrast to the English term "education," which has a much wider meaning[8] and which is included in both these languages in Art. 149. There are, in any case, no grounds at all for excluding any kind of education, such as technical, vocational, or higher education (including university education) from the term "education."

The terminology used in United Nations (UN) treaties is unambiguous: It is not confined to specific kinds of education and can apply to vocational training. "Right to education" is the general term in Art. 26 of the *Universal*

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[6] Cf. LENAERTS K., Subsidiarity and community competence in the field of Education, in DE GROOF J., *Education and Subsidiarity*, Louvain, 1994, p. 117 ff.

[7] And in particular in Art. 2 of the first Supplementary Protocol to the *European Convention on Human Rights and Fundamental Freedoms*.

[8] Concerning the term employed in the Belgian Constitution, *see* DE GROOF J., *De grondwetsherziening van 1988 en het onderwijs* (The constitutional reform of 1988 and education), *op. cit.*, pp. 81-85.

Declaration Of Human Rights,[9] which further on specifies, among other things, “technical education” (enseignement technique) and “professional education” (enseignement professionnel). The latter term becomes “vocational education” (enseignement professionnel)[10] in the International Covenant on Economic, Social and Cultural Rights. The same trend is found in the International Treaty on the Rights of Children[11]. The term “vocational training” does not form part of the instruments employed at this level.

There is no room for legal uncertainty in the broad definition given to the term “education” in the aforementioned Art. 2 of the Supplementary Protocol to the European Convention on Human Rights. The activities of the International Labour Organisation extend the definition of education to “vocational training and guidance,” considered from the standpoint of the business sector in the sense of “continuing training” or “professional training.”[12] The European Social Charter guarantees the right to “vocational training”[13] (formation professionelle). A component of this is the possibility of access to higher technical and university education. In view of the relationship between the Charter and the Conventions of the International Labour Organisation, such an extensive interpretation of the concept “vocational training” should come as no surprise. Vocational training was also considered to be one of the strands of the European Community’s (EC) socio-economic policy.[14] As soon as the Treaty on European Union defined education as forming a full part of its sphere of influence and action, the one-sided interpretation of the vocational training concept underwent a transformation and education was invested with full legitimacy.[15]

In OECD reports, too, education takes precedence over (vocational) training, other than that provided at specialised training centres or on-the-job training.[16] Yet, a certain level of harmonisation is needed to ensure that the terms are used in a consistent and similar way throughout the international standards without this harmonisation process being considered out of step with national specificity on educational law.[17]

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[9] As well as in the *International Covenant on Civil and Political Rights*, Art. 18.

[10] In addition to the terms “education ” and “technical education ” at secondary level, “primary and higher education”: Art. 13, 2.

[11] Art. 28 “education” is once again the generic term that is extended by primary, secondary, general education and vocational education.

[12] See, for example, BETTEN L., *International Labour Law*, Deventer, 1993, p. 347 ff.

[13] In particular Art 10, 7 and 14.

[14] BYSE A., *EC social policy and 1992. Laws, cases and materials*, Deventer, 1992, p. 239 ff.

[15] Also as part of the life-long process of training, see, for example, PIEHL E., in *Vocational training*, CEDEFOP, 1989, 1.

[16] Higher education is defined as being a “mixture of basic education and on-the-job education, since some of the skills taught at universities are professional and include a vocational element”: *Investment in Education and Economic Growth. Markets for Learning and Educational Services*, DEELSA/ED/CERI/CD (94) 9, p. 63.

The Overall Significance of the Term "Education": Jurisprudence on the European Treaty

Some Bills of Rights stated that concepts have to be defined primarily through legislation and by the courts. This latter method has turned out to be the rule with regard to the Treaty of Rome; jurisprudence has had a direct influence on the later Arts. 149 and 150 of the Maastricht Treaty. The court took the lead in extending the sphere of the Treaty's application to education, among other things, by giving a wide definition to the concept of "vocational training." The term "education" indeed incorporates the definition that used to be given to those forms of education included in the term "vocational training," pursuant to the judgement of the Court of Justice of 13 February 1983 in the case of GRAVIER[18]: ". . . any form of education which trains for a specific occupation, discipline or position, or which imparts a special skill to enable such an occupation, discipline or position to be carried out, falls under the definition of the term vocational training."[19]

Further, just about every form of post-secondary school education would be included in the concept of vocational training, apart from "certain special courses of study, which, because of their particular nature, are intended for people wishing to improve their general knowledge rather than prepare themselves for an occupation."[20] "General school duration" cannot ("normally") be considered as vocational training[21], but the ERASMUS programme did not fall outside the scope of Art. 151 EEC.[22]

The Treaty on European Union made changes to the accepted interpretation so that in spite of the broadening interpretation of the scope of "vocational training" by the Court of Justice in the judgement of 2nd February 1988 in the case of BLAIZOT[23] and in that of 27th September 1988 concerning HUMBEL,[24] the application of the paragraph on education resulted in an autonomous definition of the concept of education.

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[17] Provisions of Art. 126, 4, first indent, and Art. 127, 4 in the Treaty on European Union.

[18] Case 293/83 [1985] *ECR* 593. See, among other, GILLIAMS H., Van "Gravier" tot "Erasmus" concerning the Court of Justice's contribution to the development of a European Educational policy, *R.W.* 1989-90, column 494.

[19] See also case 244187, *ECR*, 1989, p. 1425 (Commission vs. Council).

[20] *Ibid.*

[21] Judgement dated 27 September 1988 in the case of HUMBEL, 263/86 [198811 *ECR 5365*].

[22] Case 242/87 [1989], *ECR 1425*.

The Competence of the European Community in the Areas of Education and Vocational Training

The Specific Competences of the Community

The EC lacks a blanket regulatory competence. The various bodies of the Community are empowered only in the matter of explicitly assigned competences that are described in the various provisions of the Treaty on the basis of type and content. In Article 5 (ex article 3B), first paragraph, the EC Treaty determines that the Community shall act within the boundaries of the competences and the objectives assigned to it by this Treaty. According to article 7 (ex article 4) of the EC Treaty, each institution is expected to act within the limitations of the competences that have been assigned to it by the Treaty.[25] Each and every decision taken by the institutions must, directly or indirectly, be based on one or more explicitly stated provision of competence. In addition, it is incumbent on the Community's institutions to always indicate, on assigning normative activities, the authorities on which their competences are based. What follows demonstrates that "European education policy" is based on a variety of provisions in the Treaty.

Article 149 and 150 EC Treaty (ex articles 126 and 127)

Articles 149 and 150 of the EC Treaty are of a fundamental significance to the competence of the European Community in education matters. These articles, which were added to the Maastricht Treaty, expand on article 3(q) (ex article 3) of the EC Treaty, which provides for action by the Community in making "a contribution in education and training of high quality." The addition of articles 149 and 150 aims beyond the mere pursuit of instruments such as mobility and non-discrimination.[26] The EC is being forced to guarantee the quality of education and professional training and the promotion of the European dimension in education. Yet, there is clearly a question of a European education policy that will not remain without consequences for the educational policies of the Member States.[27]

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[23] Case 24/86 [1989] *ECR* p. 379.

[24] Case 263/86 [1988] *ECR* p. 5365.

[25] KAPTEYN, P. en VERLOREN VAN THEMAAT, P., *idem* en LENAERTS, K., "The European Union: end or means? , *R.W.* 1998-1999, p. 692-693.

[26] DE GROOF, J., "Opportunities and limitations for a European education policy," *EJELP*, 1997, p. 9.a.f.

Article 149 of the EC Treaty describes the actions of the Community and the conditions of these actions:

> 1. The Community contributes to the development of high quality education by encouraging the co-operation amongst Member States and, where necessary, by supporting and complementing their activities, in complete compliance with the responsibilities of the Member States for the content of the educational programs and the intent of the educational community and its cultural and linguistic diversity.
>
> 2. Action by the Community is geared towards;
>
>   a. development of the European dimension in education, specifically by instruction in and distribution of the languages in use in the Member States;
>   b. the promotion of the mobility of students and teachers, as well as the encouragement of the recognition of academic qualifications, diplomas, degrees, and study areas;
>   c. the promotion amongst educational institutions; the promotion of exchange of information and experience bearing on community questions that are confronting the educational systems of the Member States;
>   d. the promotion of the development of exchange programs for youth and youth workers;
>   e. the stimulating of educational programs by correspondence
>
> 3. The Community and the Member States promote the co-operation with third countries and with international organisations competent in the area of education, namely with the Council of Europe.
>
> 4. In order to contribute to the realisation of the objectives of this article, the Council:
>
>   following the procedure of article 251 and after consultation with the Economic and Social Committee of the regions, adopts incentive measures, excluding the harmonisation of the legal and administrative measures and provisions of the Member States, and adopts with qualified majority of votes, on proposal of the Commission, recommendations.

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[27] VERBRUGGEN, M., "*Europe: qualified for education ?*" *T.O.R.B.* 1991-1992, p. 131 a.f. Contra GOUDAPPEL, F., "Some observations on the European law on education," *NTOR.*, 1998, p.155.

Article 150 of the EC Treaty states:

1. The Community proposes with respect to professional training a policy through which the activities of the Member States are being strengthened and complemented, with total compliance with the responsibility of the Member States for the content and the objective of the professional training.
2. Action by the Community is geared towards:
    a. facilitating adaptations to changes in the business world, by means of professional training and re-schooling;
    b. the promotion of entry and re-entry into the labour market by improving the initial professional training and additional or continuing education;
    c. facilitating access to professional training programs and promoting the mobility of instructors and students, especially the young;
    d. the promotion of co-operation between the educational or training institutions and business organisations;
    e. the promotion of exchange of information and experience regarding the communal problems that confront the education systems of the Member States.
3. The Community and the Member States promote co-operation with third countries and with international organisations that are competent in matters of professional training.
4. The Council adopts, according to the procedure of article 252 and after consultation with the Economic and Social Committee, measures that contribute to the implementation of the objectives of this article, with exception thereto the harmonisation of the legal and administrative provisions of the Member States.

These articles do not give the EC the competence to act with regard to content and objective of the educational institutions of Member States. Nonetheless, the scope and influence that may result from the execution of these treaty provisions on the political agenda of the Member States in this respect is not inconsiderable. It is, indeed, the unfailing obligation of Member States to keep striving in concert to realise the objectives of the EC.

Competence Concerning the Recognition of Degrees: Article 47 (ex article 57) EC Treaty

Article 47, point 1 (ex article 57) of the EC Treaty establishes the foundation for the creation of directives regarding the recognition of diplomas from Member States as equivalent to national diplomas that may be demanded as legally required qualifications for exercising a defined professional function. The article states: "[t]he Council defines, according to the procedure outlined in article 251, EC Treaty directives bearing on the mutual recognition of diplomas, certificates and other titles, in order to facilitate access to activities other than those in employment service and the execution thereof."[28]

Other Specific Competences

Aside from the three articles mentioned above, additional provisions in the Treaty have a direct bearing on education:[29]

A. Article 44, point 2, sub-section g (ex article 54) of the EC Treaty offers the competence, with a view to equality, to co-ordinate the guarantees demanded by Member States from profit-oriented legal entities on behalf of participants and third parties. On the basis of this provision, EC legislation on education in accountancy has been realised which prescribes a far-reaching harmonisation of content of accounting instructional programs and examinations thereof.

B. In accordance with article 137 (ex article 118) of the EC Treaty, the Commission, despite the other provisions of the Treaty and the general aims thereof, has the objective to promote a close co-operation on the social plane, including professional training among Member States and advanced education. On the basis of these provisions, the competences of the Commission are restricted yet not insignificant as it concerns the execution of studies, the publication of non-binding advice, and the organisation of consultation.

C. Article 146 (ex article 123) of the EC Treaty finally determines that, among others, the European Social Fund take for its objective, by means of professional training and re-training within the Community, to facilitate employment and to promote the geographic and professional mobility of employees as well as to facilitate the adaptation to changes in the business culture and in production areas.

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[28] DE WITTE, B.,"Equivalency of study time and recognition of diplomas," *T.O.R.B.*, 1992-1993, p. 293-294

[29] VERMEULEN, B.P. a.o., *Access to education within the European Union*, Dutch Centre for Foreigners, 1997, p. 19.

The General Competences

Aside from specific competences, a number of general market principles in European education policy are of significance, such as the "cooperation in good faith," the "general prohibition of discrimination on grounds of nationality," the "freedom of establishment," and the "free movement of workers."

Cooperation in Good Faith

Article 10 (ex article 5) of the EC Treaty demands that Member States take all "general or special measures" conducive to ensuring compliance with the obligations resulting from this Treaty or the actions of the institutions of the EC. As such, EC members should refrain from measures that could jeopardise the realisation of the Treaty's objectives. This negatively and positively formulated prescription fulfils the obligation toward cooperation in good faith that is the responsibility of the Member States in their relations within the EC. This also makes clear that the principle of cooperation in good faith, in concert with the rights to free movement, obliges Member States to assess whether a diploma of an EC national is the equivalent of a domestic one that is required to work as a professional. Member States are not entirely at liberty in determining relevant assessment procedures, as such measures must give national authorities opportunities to make objective assessments that the holders of foreign diplomas possesses knowledge and skills that are, if not identical, at least equal to those evident from national diplomas. In such assessments of the equivalency of foreign diplomas, the sole considerations may be the level of knowledge and the skills that individuals are deemed to possess, taking into account the nature and the duration of the study time and practical training. In addition, refusal to evaluate a foreign diploma as non-equivalent to a national one must be justified and the right to legal appeal must be available. Finally, the certification procedure must be readily accessible to anyone and not dependent on payment of exorbitant administrative costs.

General Prohibition of Discrimination on Grounds of Nationality

The first paragraph of Article 12 (ex article 6) of the Treaty forbids all discrimination on grounds of nationality "within the operational province of this Treaty and notwithstanding the special attachments stated therein." This article can only be used independently where EC Law applies and the Treaty does not provide for special discriminatory prohibitions.

The jurisdiction of the Treaty pertains in particular to discrimination during admission of students to vocational education programs in a Member State where they are not citizens. These students have the right to admission under the same conditions as those that apply to national applicants. Moreover, the prohibitive clauses are herein clearly defined, as they apply not only to discriminatory treatment with regard to admission to professional training but also to financial conditions (registration fees, college expense, school expenses). In the decree in "Gravier," the Court pronounced itself unambiguously: "[t]he imposition on students that are nationals of another Member State of a compensation, registration fee or school fee as a condition for admission to courses within the framework of professional education must be interpreted, in the instance where an identical burden is not imposed on students of national citizenship, as an instance of discrimination on grounds of nationality that is prohibited by one of the instances cited in article 6 of the EEC Treaty (presently article 12 EC Treaty)."[30]

In numerous other pronouncements, the court has assumed a similar position with regard to discrimination based on nationality, amongst other instances with reference to school expenses. Belgium was repeatedly reprimanded for its continuing efforts to close somewhat to "foreigners" the very liberal access to its education system. A Member State is liable within the operational province of the Treaty of acting against article 12 (ex article 6) of the Treaty bearing on prohibition of discrimination on grounds of nationality, and repudiates the obligations that are imposed on its good self by article 10 (ex article 5) of the Treaty, when it makes admission to institutions of higher learning dependent on the payment of additional school moneys for student nationals of other Member States that have come to its territory for the explicit purpose of engaging in studies of higher learning, except when they, in their country of origin, have already been admitted to the courses and there have paid their admission fees, while these conditions are not applicable for its own nationals."[31]

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[30] CoJ., February 13, 1984, case 293/85, (Gravier), Jur. 1985, p. 593-615. the facts: Françoise Gravier is a French national who normally resides in France, as do her parents, who are also French subjects. In 1982, she enrolled in the Royal Academy of Fine Arts for a four-year course in cartoon drawing, a part of art education that is offered at this non-university institution for higher education. Such institutions are entitled to charge registration fees, in contrast to lower and secondary public or state-subsidised educational institutions, where courses are free of charge. The Academy demanded that all students pay an enrolment fee of 10.000 Belgian Francs (BEF) 10.000 and that foreign students whose parents were not residents of Belgium pay a fee of BEF 24.622. When Mrs. Gravier was denied an exemption and did not pay the enrolment fee, she was refused admission with the initial cancellation of her residence permit.

[31] CoJ., of 3 May 1994, 260/93, (Commission/Belgium), *Jur.* 1994, p. 1595.

Free Movement of Workers

An important principle of EC education policy is the liberalisation of the communal market. Thus, particular competences are grafted onto the so-called "four liberties," namely the free movement of goods, persons (workers and independents), services, and capital. In education, the free movement of individuals is especially important, as a migrating worker or self-employed worker has the right to follow educational courses under the same conditions as a national subject.

On the ground of article 40 of the EC Treaty (ex article 49), the Community determines the "measures that are necessary in order to gradually arrive at a free movement of workers as it is described in article 39." According to article 39, point 2 of the EC Treaty, free movement of workers entails the suspension of any and all kinds of discrimination based on nationality among Member Sates concerning opportunities for employment, remuneration, and other conditions of work. In Regulation 1612/68[32] and the jurisprudence related thereto, this competence is explicitly defined. Not only does it follow that a migrating worker is entitled to certain types of instruction under the same conditions as national subject workers (article 7, point 3 Regulation 1612/68), but their children are also guaranteed the right to enrol in any form of educational training under identical conditions – including study subsidies – as national subjects (article 7, point 2, and article 12 Regulation 1612/68). In addition, spouses and children have access to employment under the same conditions (article 11 Decree 1612/68), which, among other things, includes the right to equal treatment and to the same conditions by which their qualifications and diplomas are to be assessed and recognised for the purpose of gaining employment.

Freedom of Establishment

In conforming to article 43 of the EC Treaty (ex article 52), the restrictions on freedom of establishment must be lifted. Following article 44, point 2, of the EC Treaty, the Council determines appropriate directives for this according to the procedure of article 251 of the EC Treaty. Up to now, no regulation has been drawn up relating to the self-employed. Yet, the EC has the same competence with respect to these self-employed workers as it has on the basis of articles 39-40 of the EC Treaty. Worth noting are articles 11 and 12 of Regulation 1612/68 relating to all who "respectively are performing or have performed labour whether or not in an employed capacity,"[33] which means not only employed workers but also self-employed independents.

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[32] Regulation 1612/68, *Pb.* 1968, L 257, p. 2.

[33] VERMEULEN, B.P., *op.cit.*, p. 25.

The Competences for Harmonisation

Articles 94 and 95 (ex article 100 and 100A) of the EC Treaty are relevant for educational policy. These provisions contain, in general, terms formulated for harmonisation tasks with respect to legal and administrative stipulations that may exert influence on the workings of the internal market. Certain conditions, for instance diploma requirements relating to admission to a number of professions, are undoubtedly having an impact on the operation of the market. Directives are thus crucial to the exercise of various professions.

Limits to the Competences of the European Community in the Field of Education.

A broad interpretation by the Court of Justice of the various treaty articles may have far-reaching legislative consequences for educational policy in Member States. The *Blaizot affair,*[34] wherein the Belgian government was prohibited from collecting a special additional levy of school moneys from foreign students, is an example of this. In view of the relatively high number of foreign students, this judgment resulted in considerable costs in the area of higher education. A clear definition of the educational competences of the Community was in order.

Article 6 Union Treaty (ex article F): National Identity and Civil Rights

The first section of article 6 of the EU treaty stipulates that the Union respects the national identities of Member States. The educational establishment, in general, forms an important aspect of the national identity. Yet, it is necessary that this stipulation be read with articles 149 and 150 (ex articles 126 and 127) of the EC Treaty, in which case it loses a great deal of its restricting force. The second section of article 6 (ex article F) of the EC Treaty stipulates: "The Union respects the civil rights such as they are being guaranteed by the European Treaty signed in Rome on November 4,

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[34] CoJ, 2 February 1988, case *24/86* (Blaizot), *Jur.* 1988, p. 396. The facts: Blaizot and sixteen other petitioners in the main proceedings are French nationals who received a student permit to reside in Belgium for the sole purpose of studying veterinary sciences. These studies entail three years of pre-med towards the candidate's examination (comparable to BA) and three years towards the doctor's examination (PhD). The petitioners followed the courses at the Catholic University of Leuven and the University of Liège. Every year at college they paid – aside from the regular enrolment fee of BEF 10.000 and other costs that are required of all students as a standard contribution to operating costs - a supplementary enrolment fee named "school fee" in view of their foreign nationality.

1950 in protection of civil rights and fundamental liberties and as they are resulting from the communal constitutional traditions of the Member States, as general principles of Community Law." Yet, this does not mean that the EC should take national constitutions as such into account, as the evolution of EC law cannot be restricted by the constitutional provisions of the Member States.

Article 5 second paragraph (ex article 3 B): The Principle of Subsidiarity

The principle of subsidiarity is being formulated as:

> In areas that do not fall within its exclusive competence, the Community shall act conform to the subsidiarity principle, only if and in so far as the objectives of the proposed action by the Member States cannot be adequately realised and which thus, because of the scale or the effects of the proposed action, can be better realised by the Community.[35]

The underlying idea is clear: The EC needs to leave Member States sufficient room so that they may contribute to the objectives of a proposed action, if and insofar as they are capable of doing so. Thus, the EC should not wish to do everything on its own, even though it may possess the necessary official competence, but has the general obligation to ask prior to every action if the objectives for it can only be realised by its own intervention.[36]

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[35] BEKEMANS,L. en BALODIMOS, A., « Lé Traite de Maastricht et l' éducation, la formation professionnelle et la culture » (The Treaty of Maastricht and education, professional training, and culture) , *R.M.U.E.*, 1993, p. 99. Also see the protocol to the Treaty of Amsterdam regarding the application of the subsidiarity and proportionality principles: 3. The subsidiarity principle leaves intact the competences granted by the Treaty to the European Community, as explained by the Court of Justice. The criteria of article 3B, second paragraph, of the Treaty relate to areas for which the Community does not possess an exclusive competence. The subsidiarity principle functions as the guiding thread for the manner in which those competences need to be exercised on the Community level. Subsidiarity is a dynamic concept and needs to be applied in the light of the objectives set forth in the Treaty. It makes it possible to extend the action of the Community within the boundaries of its competences when circumstances so require, as well as to restrict them or to terminate them when their application is no longer justified.

[36] VAN GERVEN, W., "The principles 'subsidiarity, proportionality, and collaboration' in the European Community Law," *R. W,* 1991-19c2, p. 1241-1246 en LENAERTS, K., The European Union': end or means? ,*R. W* 1998-1999, p. 700 a.f. en LENAERTS, K. en VAN NUFFEL, P., "*European Law in its main lines,*" Deurne, Maklu, 1999, p. 148-156.

Thanks to a relatively extensive explanation by the institutions of the EC of their existing contiguous competences, they were able to exercise considerable influence on the education policy of Member States. In reality, this spill-over effect meant a centralisation of competences, without Member States having the actual possibility of exercising control over the process. In order to keep a tighter rein over the process, reference was made to the subsidiarity principle.[37]

In the text of articles 149 and 150 (ex article 126 and 127) of the EC Treaty, the principle is clearly identifiable: the Union can only in the case of certain exhaustively summarised objectives support, strengthen, and complement the activities of Member States. Thus, decisions made by the EC on the grounds of these competences should at all times be legitimised by referral to the role of the subsidiarity principle during the drafting of articles.

Articles 149 and 150 of the EC Treaty: Education Provisions

The handles that are being offered by the articles are, on closer scrutiny, not to be underestimated.[38] They concern measures of incentive and recommendations (article 149, point 4, of the EC Treaty) that are respectively complementary, strengthening, and promotional measures (article 150 point 1, and 2, jo point 4, EC Treaty).[39] In this, the EC needs to respect Member States' responsibility for the content of education and the development of their educational system, along with cultural and linguistic diversity (article 149, point 1, EC Treaty), as well as their responsibility for the content and the development of professional training programs (article 150, point 1, EC Treaty). In addition, the application of these handles must not lead to the harmonisation of the legal and administrative regulations of the Member States (articles 149, point 4, and 150, point 4, EC Treaty). In this, some nuances must be drawn: The prohibition of harmonisation is valid only insofar as an action of the EC is based exclusively on articles 149 and 150 of the EC Treaty, not in the case where the community action rests on different provisions. The obligation to take into account the "community acquis" implies that harmonisation measures based on other treaty provisions remains possible.

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[37] DE GROOF, J., "Perspectives for the international law on Education," *loc.cit.*, p. 114. Also see DE GROOF, J.en PRIESS, B., "Opportunities and limitations for a European education policy," *EJELP*, 1997, p. 9.en LENAERTS, K., "Subsidiarity and Community Competence in the field of education," in DE GROOF, J.; "Subsidiarity and Education". Leuven/Amerfoort, ACCO, 1994, p. 129-131.

[38] DE GROOF, J., "Opportunities and limitations for a European education policy," *Op. cit.*, p. 9 a.f.

[39] BEKEMANS, L. en BALODIMOS, A., *loc.cit.*, p. 103-104.

Access to Education by Students

Employed Workers /Self-Employed

According to to article 39, point 2, (ex article 48) of the EC Treaty, the free movement of workers entails the "lifting of all discrimination on grounds of nationality amongst all of the Member States, in what concerns employment opportunities, remuneration, and the other labour conditions." Article 40 (ex article 49) of the Treaty offers the base for the measures that would make this possible. It is on the basis of this that Regulation 1612/68 was drafted.[40]

On the basis of article 7, point 2, Regulation 1612/68, an EC worker in a host Member State shall receive the same social benefits as national subject workers. In the *Lair* affair, the court found that assistance in the matter of the social support and education that a Member State offers to its own nationals to allow them to follow professional training constitutes a social benefit[41] Since assistance in the matter of social support and training forms a social benefit in the interpretation of article 7, point 2, Regulation 1612/68, it is obvious that, as such, access to a professional training program also constitutes a social benefit to which a migrating worker is entitled in the same manner as national workers. In the above-mentioned case, the notion of "social benefits" is broadly defined as "all benefits that, whether or not tied to an employment agreement, are in general being granted to a national worker, mainly based on their objective capacity as worker or simply because of the fact that they happen to be nationals."

The rights as guaranteed in article 7, point 2, Regulation 1612/68, are linked to the status of an employed worker. This implies that a citizen of the community who studies part-time and is gainfully employed in a more than marginal capacity does, in fact, qualify for that status. Consistent with ED law, it is possible, under certain well-defined conditions, that the status of an employed worker is kept even in the case of full-time studies. In such a situation, it makes a difference whether the termination of employment by a worker was voluntary or imposed. When a worker terminates his employment voluntarily in order to enrol in a professional training course, he shall retain the status of worker only if there is a connection between his former employment activities and the courses he plans to take. This continuity between previous employment activities of the EC worker and the courses he plans to take is not required in the case of a worker who loses his employment involuntarily.

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[40] Regulation 1612/68, *Pb.*1968, L 257, p. 2.
[41] CoJ., 21 June 1988, case *39/86* (Lair), *Jur.*, 1988, p. 3196-3197

The text of article 7, points 2 and 3, Regulation 1612/68, relates only to EC employed workers. It can, however, be assumed that these rights, on the basis of article 43 (ex article 52) of the EC Treaty, also apply to EC self-employed workers. The court decided that withholding of maternity and child support on the grounds of residence requirements that are indirectly discriminatory in terms of the nationality of employed workers is contrary to article 7, point 2, Regulation 1612/68, and with respect to self-employed independents, contrary to article 43 (ex article 52) of the EC Treaty.[42] It is also preferable to state explicitly in Regulation 1612/68 – in that case based also on article 54, point 2, jo. article 52 EC Treaty – that these rights also apply to self-employed workers.[43]

Article 7, point 3, Regulation 1612/68 states that migrating workers in a host Member State have in the same manner and under the same conditions as national workers the right to be admitted to the "education in vocational schools, revalidation and re-training centres." Yet, the meaning of this definition is restricted. The concept of "Vocational schools" refers to institutions that offer only training courses between periods of employment or that are in some other way closely related to employment.[44]

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[42] CoJ., 10 March 1993, case 111/91, (Commission vs Luxemburg), *Jur.* 1993, p. 817.

[43] VERMEULEN, B.P.supra note 29 p.33.

[44] CoJ., 21 June 1988, case 197/86 (Brown)., *Jur.* p. 3242 "Within the interpretation of this provision, an educational institution cannot be considered a vocational school on the sole basis that it offers a certain professional training program. The concept of vocational school is more limited and relates exclusively to institutions where only training is offered that is taken by students between periods of employment or is in some way closely related to employment, particularly during the apprenticeship period. Such is not the case with universities".

Family Members of Employed and Self-Employed Workers

The Children

EC law assigns to education in the matter of admission not only rights to the EC migrants themselves but under certain conditions also to their family members. Article 12, Regulation 1612/68, states that "the children of a national of a Member State who is engaged or has been engaged in gainful employment in the territory of another Member State, and if they are there domiciled, shall under the same conditions as nationals of that State be admitted to the general education, the apprentice system, and the professional training." Member States encourage initiatives that offer these children the opportunity to be able to follow this kind of education in the most advantageous circumstances. Article 7, Regulation 1251/70[45], extends this right to the children who are granted the right to permanent residence.

The prohibition of discrimination stated in article 12, Regulation 1612/68, is further applicable to access to education, as well as to general measures of assistance that would facilitate participation in education. This provision applies to all rights pertaining to admission to education that are granted to children of a state's own nationals. This right to equal treatment holds, for example, that those entitled according to article 12, Regulation 1612/68, are entitled to financial support for education and sustenance on an equal footing with a state's own nationals. In the decree *Di Leo*,[46] the Court has stated that "[a]rticle 12 Regulation 1612/68 contains . . . a general rule that in the matter of education obliges every Member State to extend equal treatment to its own nationals and tc the children of workers of another Member State domiciled in its territory. . . . Article 12 Regulation 1612/68 admits of the interpretation that the children referred to . . . must be treated equally to own nationals in the matter of educational support."

Article, 12 Regulation 1612/68, refers to children of an EC national who, in the territory of another Member State, is engaged or has been engaged in employment. An addendum, "whether or not in gainful employment service," is lacking. In addition, article 12, Regulation 1612/68, does not make any specific reference to employed workers. The definition of an EC national who is engaged in or has been engaged in employment in the territory of another Member State will therefore have to be formulated in a sense that also includes the EC self-employed worker. Indeed, had it been the intent to exclude such an interpretation, the use of the term "worker" would have sufficed. Further, the provisions regarding the free movement of individuals, a fundamental liberty, should not be interpreted in a restrictive manner.[47]

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[45] Regulation 1251/70, *Pb.* 1970, L 142, p. 25.

[46] CoJ., 13 November 1990, case 308/89 (Di Leo), *Jur.* 1990, p. 4185.

In order for article 12, Regulation 1612/68, to apply, children need to be domiciled in a Member State where an EC national is engaged in or has been engaged in employment.[48] This residence requirement restricts the personal applicability of this article to children residing in a Member State that has admitted their parents. It does not, however, imply that the right to equal treatment is also dependent on the location where the individual in question participates in an educational program.

Another question is whether the EC nationals whose children are assigned rights under these provisions themselves need to be resident in the territory of the Member State. The fact that there is the question of an EC national who performs or performed work in the territory of another Member State points to the contrary. From a textual point of view, it is not likely that the additional phrase "performed" refers to EC nationals that have been granted permanent right of residence. In that case, article 7, Regulation 1251/70, does already guarantee the children of EC nationals the right to equal treatment as discussed.

In the *Brown* case,[49] the court was asked to consider whether a child of a national of a Member State who is domiciled in the territory of another Member State can appeal to article 12, Regulation 1612/68, when one of his parents, who no longer works or resides in the host State, last lived or worked there prior to the birth of the child, and the child is living in the host state and thus not connected with the employment of that parent. The court stated that:

> [r]egulation 1612/68 has for its objective to bring about the free movement of workers by, amongst other means, eliminating impediments to the mobility of the workers, namely where it concerns the right of the worker to have his family join him and the conditions pertaining to the *integration* of his family into the host state. In consequence, article 12 of this Regulation needs to be interpreted in the sense that it only grants rights to a child that has resided with his parents or with one of them in a Member State while at least one of the parents resided there in the capacity of worker. It thus cannot create rights for the child of a worker that was born after the worker ceased to work and reside in the host state.

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[47] VERMEULEN, B.P. a.o. *op.cit.*, p. 34.

[48] CoJ. 27 September 1988, case *263/86* (Humble), *Jur.* 1988, p. 5365

[49] Case Brown, *CoJ, June 21,1988, case 197/86,.*

It may be deduced that for an appeal to article 12, Regulation 1612/68, it is not required for the entitling parent to be a resident in the host Member State. It is, however, to be noted that article 12, Regulation 1612/68, grants rights only to children who have resided with the entitling parent in the host Member State.

This point was raised anew in the case of *Echternach and Moritz*.[50] In this judgment, the question was posed whether Moritz, as the child of a worker, could qualify for rights under Regulation 1612/68, more particularly under article 12, considering that the primary claimant (his father) had left the host Member State. The court proposed that the equal treatment that is also guaranteed to family members of an EC worker contributes to their *integration* into the social life of the host country and should conform to the objectives of free movement for workers. Literally, the Court declared as follows:

If this integration is to be successful, the children of a Community worker must be granted the opportunity to go to school in the host country and to follow courses there, as provided explicitly in article 12 of Regulation 1612/68, and they must be given the opportunity to conclude this education with success. In the case where the father returns to his country of origin and the child has no other alternative than to return for his education to the country where he followed his schooling, it is entitled as child of a national of a Member State who did perform work in the territory of another Member State, in the sense of above-mentioned article 12, to appeal to provisions of the Community Law.

Further, the Court declared that the fact that Moritz initially had accompanied his family and thus for some limited time had left the Member Sate had no bearing on the case. The requirement of this case with regard to an appeal to article 12, Regulation 1612/69, by a child of an EC nationalwhose parent had left the host Member State seems, at first sight, strict: the objective necessity for residence of the child in question for the purpose of completing its education. The court's considerations were particularly directed toward the case in question. This judgment can also be explained in the sense that the child in question can also appeal to article 12, Regulation 1612/68, to complete his education in the host Member State in the event that he intends, on completion of his studies, to remain and seek employment in the Member State in question.

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[50] CoJ 15 March 1989, Cases 389 en *390/87* (Echternach en Moritz), *Jur.* 1989, p. 761.

In the *Gaal* judgement,[51] the court declared that for the concept *child* in the interpretation of article 12 of Regulation 1612 /68 bearing on the access to education for children of migrant workers, the same conditions regarding age and social support do not apply as for the rights set out in articles 10, point 1 and 11 of the Regulation in question, so that the concept also extends to children older than 21 years and no longer dependent on their parents. The principle of equal treatment as set forth in article 12 of the Regulation extends to every form of education, whether in the area of professional training or of general education, and thus also encompasses the academic stream. This principle requires that the child of the migrating worker must be given the opportunity to continue his or her education so that it can be concluded successfully. Article 12 of the Regulation is thus of application to the financial contributions for students that are already more advanced in their studies, even in the case where they are older than 21 years and no longer dependent on their parents. Making the applicability of article 12 dependent on the age or on the status of the dependent child would, as a result, be contrary not only to the letter but also to the spirit of this application.[52]

Aside from Regulation 1612/68, Directive 77/486, on the education of children of migrating workers, is also important,[53] as it applies to "children that are subject to the compulsory education as defined in the legislation of the host Member State, that are dependent of a worker who is a national of another Member State, and that are residents in the territory of the Member State where this national is performing or performed activity in employment service" (article 1 Directive 77/486). The directive binds the Member States, in conformity with their national laws and practice and in collaboration with the Member States of origin, to undertake suitable measures in order that these children be, on their admission, offered relevant education free of charge, including the study of the language of the host State (article 2). In addition, the Member States shall, in conformity with their national laws and practice and in collaboration with the Member States of origin, undertake suitable measures so that, in co-ordination with the regular education, these children may receive education also in the language and culture of their country of origin (article 3). From the considerations in the directive, it appears that it aims to facilitate integration into the host Member State as well as to make preparations for the children's eventual re-admittance into the Member State of origin.

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[51] CoJ., 4 May 1995, 7/94 (Gaal), *Jur.* 1995, p. 1031. The facts: Gaal, a Belgian national born in 1967, has been living in Germany since 1969, where he finished his secondary schooling and went into the study of biology. As of 1987, following his father's death, he has been receiving an orphan benefit, his only source of income. In 1989, Gaal applied to the Landsamt für Ausbildungsförderung for a study grant in order to enable him, within the framework of his educational background, to take an eight-month course at a British university. The Landsamt turned down his application on the grounds that he is over 21 years old and not dependent on his parents, making him ineligible for a grant under German law.

[52] Decision Gaal r.o. 24 and 25.

[53] *Pb.* 1977, L199, p. 32.

The Spouses of EC Employed Workers and Self-Employed Independents

Regulation 1612/68 states no provision regarding the right of access to education for the spouses of migrating workers: Article 12bears only on the children of these workers. Yet, there are various reasons to assume that the spouse has the right to equal admission to education as well. Article 7, point 2, Regulation 1612/68, is a clinching argument: On the grounds of this Regulation, an EC worker in the host Member State enjoys the same "social benefits" as national workers. Under these benefits the granting of rights to family members may also be included.[54]

In its *Deak* judgment, the court declared that article 7, point 2, Regulation 1612 includes the principle of equal treatment for workers that are nationals of a Member State as well as, indirectly, for members of their families.[55] Applied to the present situation, this implies that the spouse, even when the spouse is not a national of a Member State, has equal access to a right derived from a worker. In addition, reference can be made to the prohibition of discrimination resulting from article 6 first paragraph of sections 149 and 150 of the EC Treaty. On the basis of article 12 (ex article 6), jo article 150 (ex article 127), the court reached the decision that the obligation of an EC national to pay registration fees for a professional training program where such is not demanded of the state's own nationals is contrary to EC Law, as from the combination of provisions there follows a right to equal access to education.[56] This is also valid for spouses of EC self-employed workers. This is assuredly the case with reference to the rights derived from article 12, Regulation 1612/68, jo 149 and 150 of the EC Treaty relating to spouses and EC nationals, regardless of any capacity as the family member of an employed or self-employed worker. In addition, the denial of a right under article 7, point 2, Regulation 1612/68, which applies to spouses of EC self-employed workers, is contrary to article 43 (ex article 52) of the EC Treaty.

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[54] VERMEULEN; B.P.a.o., *op.cit.*, p. 37-38.

[55] CoJ., June 20, 1985, case 94/84 (Deak), Jur. 1985, p. 1887. The facts: Deak, of Hungarian nationality, resides in Belgium with his mother, an Italian national gainfully employed in Belgium. Questions have been raised in a dispute regarding the refusal by the National Manpower Office to allow Deak the interim allowances that are provided by Belgian legislation for youthful workers that cannot find employment after the completion of their schooling or apprenticeship. The refusal to pay such benefits to Deak was based on his Hungarian nationality: the relevant Belgian legislation states that these benefits are only paid to foreign and stateless employees "within the dictates of an international agreement." Between Belgium and Hungary, no such agreement has been concluded.

Teachers[57]

Definition of Teacher or Teaching Staff

The terms "teacher" or "teaching staff" include individuals who are, by reason of their function, directly involved in the educational processes in Member States. The meaning varies depending on the constitution of the educational system in each Member State.[58] In Belgium, for example, this means that members of the administrative executive, pedagogical advisers, and PMS centres (meaning centres for student guidance) are also part of the European legislation.[59]

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[56] CoJ., July 13, 1983, case 152/82 (Forcheri), Jur. 1983, p. 2336. The facts: Marisa Forcheri, of Italian nationality, is the spouse of a functionary of the Commission of the European Communities employed in Brussels. For three years, she followed courses at the Institut supérieur de sciences humaines appliquées in Brussels, courses that among other areas prepare students for a career as social worker. At the start of the academic years 1979-80 and 1980-81, she was required to pay additional enrolment fees, the so-called college fee for foreign students.

[57] See DE GROOF, J., "The Legal Status of Teachers in Europe," Leuven, Acco, 324p Yearbook edited by the European Association for Education Law and Policy.

[58] Socrates-program - Decision *819/95/EG* of the European Parliament and the Council of March 14 1995.

[59] VERBRUGGEN, M., "The influence of the European Community Law on the law on education in the Flemish Community," Final report mandated by the Ministry of the Flemish Community, Leuven 1992, p. 106.

Free Movement of Labour

The question whether a member of the teaching staff in the public education system could be considered a worker in the interpretation of the Treaty was first raised in the case of Lawrie-Blum.[60] Here the court deliberated whether the candidate-teacher fulfilled the conditions to be considered a worker in the interpretation of article 39 (ex article 48) of the EC Treaty and Regulation 1612/68. The primary characteristic of a labour relation is, the court ruled, "that a person during a specific period of time delivers a performance for another person and under that person's authority, and in return receives a compensation." During the duration of the teaching practice, the candidate-teacher worked under the authority and the supervision of the school to which she had been assigned. This school defined her duties and work hours, and she was expected to abide by the school's directions. The teaching practice mainly consisted of the candidate's teaching lessons so that she performed services that rated a certain economic value. Thus, the money that the candidate teacher received should be considered a compensation for the performed services and for the obligations that were inherent to the practice. These considerations made the court decide that all conditions that would justify the use of the term "labour relation" had been met. The work did not lose its economic character for having been executed in the application of a public law statute. Hence the court's referral to the judgment in the *Sotgiu*[61] case, where it had previously ruled that the nature of the legal relationship between employee and employer – a public law statute or a private law contract – is not a pertinent consideration for the application of article 39 (ex article 48) of the EC Treaty. In Lawrie-Blum, the court added that a series of circumstances did not act adversely on the character of the labour relationship, contrary to what one might have expected. Thus, the facts that the candidate-teacher taught only a limited number of hours or that the compensation was below the minimum salary were unimportant. At the same time, neither was it judged appropriate to consider the practice time as part of the preparation for the profession. It was sufficient that real and actual labour had been performed.[62] The viewpoint of the court was clear: A "candidate teacher" who, under the guidance and supervision of educational authorities, performs practice-teaching duties in preparation for becoming a teacher who receives compensation, regardless of the legal character of the labour relationship, is to be considered a worker in the interpretation of article 39 (ex article 48), point 1, of the EC Treaty. It can be directly deduced that a teacher in general, in a public educational institution, answers to the definition of worker as interpreted in article 39 (ex article 48) of the EC Treaty.

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[60] CoJ., July 3, 1986, 66/85. Lawrie-Blum, Jur. 1986, p. 2139. The facts: A British subject had passed the first state examination at the University of Freiburg towards a teaching certification for the higher secondary school level. Admission to the apprenticeship program that leads to the second state examination, which gives access to a teaching career at the higher secondary school level, was denied to her by the Obershulamt Stuttgart. A candidate who is admitted into the apprenticeship program is appointed as candidate teacher in the capacity of civil servant until further notice, and thus benefits from all the advantages that are connected to the status of civil servant. Only those that are admitted to the apprenticeship satisfy the personal conditions necessary to become civil servant. Holding German citizenship is necessary. The person involved receives a compensation that is based on the minimum salary of a teacher with regular appointment.

[61] CoJ., February 12 1974, 152/73, Sotgiu, *Jur.* 1974, p. 1405.

On recruitment (or admission to recruitment examinations), and on promotion of civil servants and other public administration personnel, the principle of equivalency for diplomas issued by another Member State must be recognised. In addition, the recruitment or admission to recruitment examinations should not be made dependent on the requirement of nationality; article 39 (ex article 48), point 4, of the EC Treaty does, in fact, state that not all jobs in public administration may be reserved for a state's own nationals.[63] Only those that imply direct exercise of public authority may be reserved for nationals. Further, nationals can hold foreign diplomas.[64] The court unambiguously ruled:

> In this respect, as the Court considered in its pronouncement of July 3 1986 (case 66/85, *Lawrie-Blum,* Jurispr. 1986, p. 2121), it must be stated that the profession of teacher does not belong to the professions which, either directly or indirectly, include participation in the exercise of public authority and encompass duties tending towards the protection of the general interests of the state or of other public bodies, and that,

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[62] DE BLOIS, M., "European Community Law and education," *SEW.*, 1991, p. 518.

[63] See VERBRUGGEN, M., *supra note 29.*p. 116. "A teacher does not practise a profession of public service within the sense of article 39, point 4, EC Treaty. The actual measures that are necessary for a teacher to take, such as maintaining discipline, assigning marks for performance, or handing out penalties are not sufficient to rate as an exercise of public authority."

[64] FRAZIER,C., "*Education and the European Union*", *R.M.C.U.E,* 1997, p. 470

> by their nature, presuppose a special bond of solidarity between the functionary involved and the state, as well as a reciprocity of rights and obligations that form the basis of the "nationality ratio."[65]

Among other points, the court held that nurses in public hospitals and at municipal nursery schools do not come within article 39, § 4.[66] It is also irrelevant in what capacity a public function is exercised, be it as a white- or blue-collar worker or as a civil servant. Whether the status is governed by public or by private law is likewise irrelevant.[67]

Freedom of Establishment

Although teachers generally work in employment service, it is possible for them to work in a self-employed capacity or even found private schools. The courts have ruled that in the latter case, the regulations regarding freedom of establishment are applicable: Activities or services performed for compensation are subject to the provisions of articles 39 and 49 (ex articles 48 and 59) of the EC Treaty. *Mutatis mutandis*, this also is valid in the case of domicile in a Member State where full-time permanent gainful employment is being offered.[68]

Free Movement of Services

Also confirmed by the above-mentioned decision was the fact that the principles of the freedom of performing services apply to teaching. The prohibition that existed in the Greek legislation denying the right of nationals of other Member States to offer private tuition at home was ruled contrary to the freedom of providing services.[69] The Court stated that "insofar as it [the prohibition] relates to nationals of other Member States who are travelling to Greece for the purpose of providing incidental services,[70] it will not be possible to consider teaching activities as providing services in the interpretation of the treaty since one of the elements of the concept 'service' declares that it has to involve an activity that normally is carried out for compensation." In the case of courses given within the framework of the national educational system, the Court judged that this characteristic was not present: "Article 59 (presently article 49) EC Treaty needs to be explained in the sense that courses offered at a technical institution operating on the secondary education level in the framework of the national educational system are not to be considered as services within the interpretation of that provision."[71]

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[65] Decision of May 30 1989, (Allué), *SEW* 1989, 787, r.o. 7. en HOPKINS, N., "Recognition of Teaching Qualifications: Community Law in the English Context," *E.L.Ra.f. Dec.*, 1996, p. 436.

[66] Case 149/72, Court of Justice, Commission against Belgium, 26 May 1982.

[67] Case 152/73, Court of Justice, Sotgiu, 12 February 1974.

[68] CoJ., January 13 1988, 147/88, (Commission/Greece), *Jur.* 1988, 1637. en DE BLOIS, M., "European Community Law and education," *SEW*., 1991, p. 522.

[69] See also VERBRUGGEN, M "The influence of the European Community Law on the Flemish Community."

Conditions for Access to Education or a Profession

Diplomas

In order to gain access to an education or a profession, one must often first have a certain amount of knowledge. This foreknowledge is generally represented by a diploma. It is evident that a national education system, which requires a diploma issued by its own system for access to further education, can present considerable obstacles for students from other Member States, who will generally only have diplomas issued by the educational establishments of their own countries. The Community is striving to lift these obstacles as much as possible by encouraging the mutual recognition of diplomas and other educational qualifications.

Academic and Professional Recognition of Diplomas

Introduction

Traditionally, there are two forms of diploma recognition: professional and academic.[72] Academic recognition of foreign diplomas and other educational qualifications serves as a means to gain access to further education in a country. Such recognition means that course credits achieved elsewhere are transferred to the further education of a Member State or qualify as sufficient. This form of recognition usually has a direct influence on the content of the education.

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[70] Case 147/86, (Commission/Hellenic republic) *Jur.*1988, p. 1656, r.o. 18.

[71] Decision of September 27, 1988 in case 263/86 (Humbel). Jur. 1988. p. 5388, r.o. 18.

[72] See ZILIOLI, C., "The Recognition of Diplomas and its Impact on National Educational Policy" in De WITTE, B., (ed.). *European Community Law on Education*, Baden-Baden, Nomos, 1989, p. 546.

The less far-reaching "professional recognition" serves to have a foreign diploma recognised for a trade or profession for which a diploma is a legal requirement. This distinction is particularly relevant because there is a clear difference in the scope of the respective competences: The powers of the Community in the field of academic recognition are more limited, whereas its powers in the matter of professional recognition are anchored in the EC Treaty.[73]

Professional Recognition of Diplomas

Phase 1: The Sectorial Approach

In Article 47, paragraph 1, (formerly Article 57) of the EC Treaty, the EC was ordered to set directives regarding the mutual recognition of diplomas, certificates, and other titles with the aim of facilitating access to work activities other than in paid employment and the pursuance thereof. Until the middle of the 1980s, the Council – at the Commission's proposal – took a sectorial approach:[74] Per profession or branch of industry, directives were set forth that made access to those professions possible on the basis of diplomas or professional experience acquired in another Member State. The sectorial directives fall into two categories. First, there are a number of directives regarding recognition of diplomas with harmonisation of educational requirements. The relevant education or training in the Member States must meet the requirements set forth in the coordination directive before there can be any talk of diploma recognition. This category includes professions such as doctor, dentist, general hospital nurse, obstetrician, pharmacist, and veterinarian. Second, there are directives regarding recognition without harmonisation: In this way, for example, training for architects[75] was not coordinated. If an educational programme meets the requirements with regard to level and duration of a course of study as set forth in the directive, then the awarded diploma can be recognised in another Member State. This method of sectorial directives led only to limited results.[76]

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[73] VERBRUGGEN, M, "Communication from the Commission concerning the recognition of diplomas for academic and professional training: a critical evaluation." *TO.R.B.*, 1995-1996, p. 33 and DOLLAT, P. "*Free movement of persons and European citizenship*: issues and perspectives," Brussels, Bruylant, 1998, p. 28-29.

[74] PERTEK, J., « Diploma recognition, an original benefit to be developed », *J.T.D.E.*, 1999. p. 180.

[75] Directive of 10 June 1985, *Pb.* 21 August 1985, *223/15*.

In the context of the realisation of the internal market, another approach was sought to represent an overall solution to the issue of mutual recognition of diplomas. A general system of equivalence of university diplomas had to be reached, an idea that was adopted in the White Paper of the Commission. The Council succeeded quite quickly in laying down Directive 89/48 on the basis of Articles 40, 47 and 55 (formerly Articles 49, 57, and 66) of the EC Treaty.[77]

The Directive 89/48 created a general system for higher education diplomas awarded after a study cycle of at least three years. To be able to make the system a true general system, the Commission submitted a second proposal, following on from the first directive, which organised the mutual recognition of all other diplomas. This proposal led to Directive 92/51.[78]

Phase 2: The General System

First, it should be clearly pointed out that the general system only has bearing on the recognition of diplomas for the purpose of carrying out an economic activity. The general system does not take into consideration the issue of academic recognition of diplomas. It is a general system because it applies to all sectors, unless a specific recognition directive already exists for the activity concerned. It applies to both the freedom of movement of workers and of services as well as for the right of establishment, but it goes without saying that it is in the latter area that the general system plays an essential role.

A general system does not affect national rules regarding education and pursuance pursuit of a profession. It leaves each Member State completely free to further regulate the content and duration of education and professional training. A general system also lets each Member State freely decide whether access to or the practice of a professional activity must be made dependent on a diploma and, if so, which level the required training must have. A general system only regulates the "conditions" under which citizens of the EU who had education or training in another Member State can also gain access to the profession concerned. A general system is based on mutual trust that the quality of the education and professional training are generally equivalent. Of course, there will sometimes be differences in the duration and/or content of the studies; those can be compensated for in the general system. Yet, when a diploma demonstrates that an individual participated in a course of study during a certain period of time, learned a particular subject matter, or acquired a skill, then it cannot be called into question. A general system acts on the assumption that requirements for access to a profession correspond to a great extent between Member States. A general system, therefore, does not provide for the recognition of a particular diploma but organises the mutual recognition of diplomas, certificates, and any additional professional training as a whole that are required to practice a certain profession in the Member State of origin. That full range of diplomas is in principle sufficient to practice a certain profession in another state other than the Member State of origin. A general system therefore rests on the mutual trust that he or she who can practice a profession in one Member State will generally also have the necessary skill to practise that profession in another Member State.[79] It is only when the duration of the education or training was at least one year shorter or when it had bearing on subject matters that differ substantially from those in the receiving Member State that those insufficient qualifications must be compensated, either by demonstrating professional experience, by completing an adaptation period, or by taking an aptitude test.[80]

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[76] JORIS, T en VENY, L, " The recognition directive, a step forward in the direction of free movement of persons? ***R.W.***, 1989, p. 521 a.f..

[77] CARNELUTTI, A., "The Europe of liberal professions: recognition of higher education,"
R.M.U.E., 1991, p. 26. For conversion problems of the directive in Belgium, see: LENAERTS, K. and FOUBERT, P. "Belgian Law and the European Community (1993-1996*)*," *E.L. Ra.f.1997*, p. 617.

[78] *Pb.* 1992, L. 209, p. 25, modified by Directive 94/38, *Pb.* 1994, L. 217, p. 8 and RL. 95/43, *Pb.* 19995, L 184, p. 21.

The General System of Recognition

The principle rests on the idea that an individual who is completely qualified to practice a profession in the Member State of origin can also work in another Member State. This can, for example, result in someone who has completed his or her studies in his or her country of origin in accordance with the laws in effect there having to complete a period of in-service training, although that may not be required for those who studied in the receiving Member State.[81] The system distinguishes threelevels of education and training:

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[79] VAN NUFFEL, P., "The general system of diploma recognition," *SEW.*, 1996, p. 372 a.f.

[80] CoJ. Judgement of 7 May 1991, case C 340/89 (Vlassopoulou), *Jur.* 1991, p. 2357.

> higher education of the longer type (Article 1a Directive 89/48:[82] the person has a diploma "awarded after a post-secondary study of at least three years (or an equivalent part-time study) at a university or institute of higher education, and, if necessary, additional professional training."
>
> higher education of the shorter type (Article 1a Directive 92/51)[83]: the person has "a diploma" awarded after a post-secondary study of at least one year (or an equivalent part-time study) at a university or institute of higher education, and, if necessary, additional professional training, or has a diploma from one of the educational programmes listed in appendix C of Directive 92/51.
>
> *professional training* (Article 1b Directive 92/51): the person has "a certificate" awarded after complete (general or technical) secondary studies, followed by (further) professional training or a period of practical experience.

The general system of recognition compares the diploma or certificate that is required in the receiving Member State for access to or pursuance of a profession with the academic titles that the person in question has. With this process it is important to know whether a profession or professional activity was also regulated in the Member State of origin[84] and whether there are real differences between the subject matters taught or the duration of study in view of any compensation for insufficient qualifications.

Recognition Procedure

The general system also includes the minimum requirements that must be met by national procedures for the recognition of foreign diplomas. Of great importance is the principle that the receiving Member State must recognise the certificates and documents provided by the Member State of origin as evidence (Article 8, paragraph 1, Directive 89/48; Article 12, paragraph 1, Directive 92/51). Further, the directive includes classic provisions whereby the documents issued by the governments of another Member State which show that the individual in question never went bankrupt, has not committed any serious professional misconduct, has not been criminally convicted, etcetera, must also be recognised by the other Member States when they request such evidence. The receiving Member State must make a decision no later than four months following submission of the file. In this regard, the competent authority of the receiving Member State will have to make a comparison between the academic titles of the individual concerned and the diploma or certificate that is required in the receiving Member State for access to or pursuance of the professional activity. An appeal to the court against the decision must be possible (Article 8 Directive 89/48; Article 12 Directive 92/51).

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[81] VAN NUFFEL, P., " The general system of diploma recognition ," S.*E W*, 1996, p. 377 a.f.

[82] *Pb.* 1989, L.19, p. 16.

[83] Directive 92/51, *Pb.* 1992, L 209, p. 25.

[84] CARLIER, J-Y., "The free movement of persons within the European Union," *J.T.D.E.*, 1997, p. 198.

Range of Application of the General System

Personnel Range of Application

The general system is only applicable to the nationals of the Member States (Article 2, Directive 89/48 and Article 2, Directive 92/51). Nationals of third countries, even if they have been awarded a diploma in a Member State, cannot appeal to the general system. The range of application was expanded to the European Economic Area so that the general system now also applies to the citizens of Norway, Iceland, and Liechtenstein and reciprocally for citizens of the EU in those countries.

One can also call upon the general system in the Member State of one's nationality, particularly to obtain recognition of diplomas earned in another Member State. An individual who wants to pursue his or her profession in the Member State where he or she studied must nonetheless meet the national requirements, even if it would be easier for citizens of the EU who studied in another Member State via the general system to gain access to that profession. After all, EU law is not applicable to purely internal relations for which all relevant aspects are found in the same Member State.

Diplomas from Third-Party Countries

Although the general system, in principle, only organises the mutual recognition of diplomas issued in the Community, or by extension in the EEA, the general system to a certain extent also obliges those who have a diploma awarded in a third-party country. He who has a diploma awarded in a third-party country must first obtain recognition in one of the Member

States on the grounds of the national law of that Member State. As demonstrated by the court's verdict, Community law in principle does not attach any further consequences to any such recognition: The other Member States are free to recognise or not recognise that foreign diploma.

Article 1 a) of Directive 89/48 and b) of Directive 92/51 put a diploma awarded in a third-party country on a par with a Community diploma when the holder has acquired three years respectively two years of professional experience in the Member State that recognised that diploma. In other words, when a Member State has recognised a diploma from a third-party country, and the person involved has also practised his profession in that Member State, then he can still, after three respectively two years via the general system, enter that profession in another Member State, even though the latter would not have recognised the third-country diploma on the grounds of its national regulations.

With regard to the recognition of diplomas of holders from third Member States, the court repeated in *Haim* and in *Tawil-Albertini*[85] that Member States are not required to recognise these diplomas on the basis of Directive 78/687, nor are they required to take into consideration recognition by other Member States. " Member States do indeed remain free, pursuant to Article 1, paragraph 4, of Directive 78/687, to allow access to the work of dental practitioner on their own territory and in accordance with their own regulations for individuals with diplomas earned in a third state. From this it follows that recognition by one Member State of a title awarded by a third state is not binding to the other Member States."[86]

Relation to the Sectorial Directives

The general system is not applicable on the one hand "to professions that fall under a specific directive whereby mutual recognition of diplomas between Member States is established," such as doctor, nurse, dentist, veterinarian, obstetrician, pharmacist, architect, certain transporters, and, on the other hand, "to activities that fall under one of the directives in the appendix (with Directive 92/51)." The general system also does not apply to the activities that fall under these directives.

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[85] CoJ., judgement of 9 February 1994, case 154/93 (Tawil-Albertini) , *Jur.* 1994, p. 451. In CoJ., Judgement of 9 February 1994, case 319/92 (Haim), *Jur.* 1994, p. 425.

[86] Tawil-Albertini, r.o. 12-13.

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The Commission gives preference to the general system above the sectoral approach. It will only propose a special measure for a profession if experience shows that the general system is not sufficient to ensure true freedom of movement in the sector and on the condition that a sufficient consensus is reached about the measures to be taken among the practitioners of a profession in the Community.

"In view of practising a regulated professional activity"

The general system is primarily applicable to government-regulated professions. In a communication from the Commission,[87] a distinction is made between professional recognition *de jure* whereby the practice of a profession in the State in which one wishes to work is subject to having educational diplomas issued by the State, and professional recognition *de facto* whereby the practice of a particular profession is not regulated in the host country, and the problem of recognition is primarily one of insufficient familiarity with the diploma on the part of recruiters.

Right of Establishment

The general system is primarily of importance to those who want to take up a regulated activity other than in paid employment in another Member State on the basis of the right of establishment. Already before the establishment of the general system, in the *Heylens* and *Vlassopoulou* judgements, the court formulated the obligations, which fall to the receiving Member State pursuant to Article 43 (formerly Article 52) of the EC Treaty.

The authorities from whom a permit for practising a profession is requested by someone who has already been granted entry to that profession in his or her country of origin must investigate the extent to which the requester's diploma, earned in the country of origin as evidence of knowledge and skill, corresponds to that which is required by the legal regulations of the receiving Member State. If the diplomas correspond only in part, then the authorities referred to can require proof from the individual that he or she has acquired the knowledge and skills that were lacking.[88] If necessary, it may also be required that the person sit for an examination. The decision whereby the diploma or professional title of a national of another Member State, which was issued by his or her own Member State, is not recognised or not considered equivalent, must be open to appeal in a court of law so that it can be examined for compatibility with EC Law, and the person in question must be able to find out the reasons for the decision. Moreover, in the *Aguirre Borrell*[89] judgement, the court noted that Articles 43 and 47 (formerly Articles 52 and 57) of the EC Treaty do not oppose that a Member State imposes criminal sanctions on the pursuance of a regulated profession by a national of another Member State, which does not meet the requirements laid down by law in the receiving Member State.

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[87] Com (94) *596* of 13 December 1994.

[88] CoJ, 7 May 1991, case 340/89, Judgement (Vlassopolou), *Jur.* 1991, p. 2357, r.o. 23.

Freedom of Movement for Workers

Although the general system is usually associated with the right of establishment, its significance for the freedom of movement for workers cannot be underestimated. This may seem paradoxical given that one cannot force a private employer, who is free to hire whom he wishes, to recognise the equivalence of a foreign diploma: The barriers that the general system aims to clear away must come from the government.

Free Movement of Services

Without a doubt, a service provider who wishes to do so can call upon the general system. The directives are, among other things, based on Article 66 (now Article 55) of the EC Treaty and are applicable to the pursuance of a regulated profession as both a self-employed person or as a wage earner (Article 2). The question, however, is whether a service provider can be required to have his or her diploma recognised via the general system before providing any service at all for an establishment in another Member State. Even though the general system aims to facilitate the freedom of movement of persons, the recognition of diplomas does not happen by itself. A file must be submitted, the investigation can last four months, and an adaptation period or aptitude test may be required. For those who effectively wish to establish themselves, this procedure is not insurmountable; however, a service provider will see this differently. According to Article 59 (now Article 49) of the EC Treaty, a national regulation cannot limit the freedom of service provisions, not even when it applies without distinction to both the service provider established in the relevant Member State and to service providers established in other Member States. When a receiving state still requires diploma recognition, then this in principle can only be justified by compelling reasons of public interest. In this case, it will also be verified that the application of the general system is proportional. Much will depend on the nature of the service provided: whether or not it is non-recurrent, involves movement or is written, and so forth.

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[89] CoJ, 7 May 1992, case 104/91, Aguirre Borrell , *Jur.*, 1992, p. 3003.

Without a doubt, providers of education have free movement of services.[90] Yet, in the *S.M. Wirth*[91] judgement, the court clearly used a limitation. The court determined that education at a university that is primarily financed by government resources is not a provision of services in the sense of Article 50 (formerly Article 60) of the EC Treaty. According to this article, only provisions of services that are usually made for a fee fall under the chapter regarding services. The essential characteristic of the fee is that it forms the economic quid pro quo for the service in question. This does not apply to courses at universities that are financed by public resources and that receive only tuition fees from students. On the other hand, courses at universities that are for profit and that are primarily financed by private resources, namely via fees paid by the students or their parents, are service provisions in the sense of Article 50 (formerly Article 60) of the Treaty.

The Academic Recognition of Diplomas

With regard to the recognition of diplomas, certificates, periods of study to commence, and further studies, there are even more obstacles. The powers of the EC to lay down rules with regard to the national educational programmes are, after all, limited: The content of educational programmes as such is not a subject of potential regulation. The Community is not authorised to establish rules concerning content in view of mandatory recognition of education results earned in other Member States for the purpose of further studies (academic recognition). Within academic recognition, a two-fold distinction can be made through accumulation and through substitution.[92]

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[90] In the Decision Commission/Greece which involved prohibiting people who did not have the Greek nationality to provide education, the Court judged that this was in contravention of Article 49 formerly Article 59 EC Treaty: "insofar it has bearing on nationals of other Member States who would go to Greece to carry out incidental services" in CoJ., 15 March 1989, *Jur.* 1988, 1656, r.o. 18.

[91] CoJ., 7 December 1993, case 339/92, '(Wirth), *Jur.* 1993, p.6447.

[92] PERTEK, J. en SLEIMAN, E., " Students and the Community: Account of the status of a mobile student ', *R.M C.U.E.*, 1998, p.311-313

Recognition Through Accumulation[93]

Academic recognition through accumulation means recognition of a study cycle taken in one Member State whereby the requirement is met for a second study cycle as a supplement to the first; this recognition has to take place when a student wants to pursue further studies in another Member State. The student must convince the university of the receiving Member State that his diploma from, or period of study at, his university of origin is sufficient to be granted entry to a next period of study at the receiving university. The decision is therefore made in the host country and falls under the authority of the university or of an administrative government.

Recognition Through Substitution

Academic recognition through substitution means recognition of qualifications earned in one Member State whereby certain parts of studies primarily done in the other Member State are considered to be achieved. In other words, a period of study in another institution replaces that which would normally be taken at the university with which the student remains associated and which will ultimately award the diploma.

A guarantee for this recognition in advance is provided for in the Erasmus programme. The university of origin agrees to recognise the periods of study completed by the student at the university of the host country. The recognition is always on the part of the university of origin at which the student remains enrolled and is based on the respect of the agreements made in advance between the university of origin and the university of the host country.

Related to this, in the framework of the Socrates/Erasmus programme, the ECTS system (European Community Course Credit Transfer System) was developed based on cooperation among universities which, on their own initiative, work together to facilitate the academic recognition of periods of study completed at an institution in another Member State. This is a course credit transfer system (Action 1 A sub b of the Erasmus programme).

As evidenced by reports brought forward during the seventh ELA convention in Granada,[94] this system is still in its early stages in most European countries and certainly not yet completely established at all universities. Beyond the Erasmus programme, academic recognition is not at all generally accepted.[95] Law studies especially encounter problems with this system because of the national nature of the subject matter. Belgian state law is different to the *Droit Constitutionnel* of France or the Constitutional Law of Britain. In Belgium, this difficulty is serious because a law diploma provides direct access to the pursuance of certain professions. The problem is less pressing in those countries where access to legal professions is subject to a special examination for which one can prepare, after university studies, through additional studies of national law.[96] During that same Conference, it was expressed that mutual trust can only be achieved when Member States work with a system of external monitoring of examinations, strict rules governing results, and an external body to closely monitor the quality of education, as is the case in England. Most European Member States support the establishment of a European body of external monitoring, provided that the States have a voice in the criteria, set in advance, that determine the quality of education.

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[93] PERTEK, J., " A process of diploma recognition for professional and for academic purposes: realisation and new thoughts ", *R.M. U.E.*, 1996, p.103.

[94] See DE GROOF, J. a.o. "Art meets Law in Education", in press.

[95] VAN DER MEI, A.P. "EC law and education ", *NTOR*, 1995-1996, p.21.

Shortcomings of Diploma Recognition

According to Dankelman, there are three reasons why the directives (both the general system and the sectoral directives) did not lead to the desired results.[97]

Information Deficit

The first reason is that diplomas on the European market provide insufficient information about the knowledge and capabilities of a professional. An educational qualification says something about the level of knowledge but provides no insight into the quality of the professional practice and performance. For this reason, directives are actually only useful for young, recently graduated professionals. Their diploma is evidence of their competence; yet, as their careers progresses, the importance of their diplomas will diminish, and job experience will become increasingly important. This professional aptitude is, however, more difficult to measure.

Trust Deficit

The second reason why diploma recognition does not work well is that the European institutions have not enough trust from their potential consumers. Institutions have insufficient authority to supervise the observance of their own rules. The implementation and monitoring of the compliance of the rules is in the hands of the Member States. Because of this, misuse or "creative" use of European recognition rules is difficult to monitor, and it is even more difficult to issue sanctions in case of misuse.

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[96] VERSTEGEN, R., "Toward a European Law educational programme", *R.W.*, 1990-1991, p. 657 a.f.

[97] DANKELMAN, S., "Europe held hostage! The European recognition of architectural engineers ", Deilt, Eburon.
1999, p.14-15.

Flexibility Deficit

Because directives are always based on shaky compromises, the political cost of change of the European legislation is too high. The directives are therefore never "up to date" with the situation in the Member States and are not easily used by consumers of professional services.

Protection of the National Language in European Community Law

Introduction

The position of education and culture has always been somewhat precarious in EC Law. The matters of language and education were consciously kept outside the sphere of application of the Treaties. Only integration at the economic level was important, while at the cultural level, it was preferred to maintain national traditions and preserve the existing diversity.[98]

The Allué and Coonan Judgements

With regard to language, two important cases were decided in 1989. The first case[99] involved two foreign teachers, one British and the other Spanish, who taught the English and Spanish languages, respectively, at an Italian university. In an Italian court, they objected to the application of a presidential decree, according to which their appointment to the University of Venice could not be extended. Pursuant to that decree, foreign language teachers could only get a temporary contract for the duration of one year that could be renewed on an annual basis with a maximum of five years. Although this regulation does not make any distinction with regard to nationality, the court determined that it especially affected workers from other Member States. Only 25% of teachers of foreign languages were of Italian nationality. The Italian government put forward various justifications for the regulation, such as the need to have teachers with up-to-date knowledge of their native language and the importance for universities to be able to respond flexibly to the variable intake of students. None of the reasons put forward by Italy could, in the eyes of the Court, be considered a justification for the unequal treatment.

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[98] VERBRUGGEN, M., "The influence of European Community law on education law in the Flemish Community", *loc.cit.*p. 106.

[99] Judgement of 30 May 1989 in case 33/88, Pillar Allué and Carmen Mary Coonan versus the University of Venice, *Jur.* 1989, 1591.

The Groener Judgement

In the second case, the Court clearly gave the Member States the necessary room to lay down language requirements in the framework of education.[100] On the basis of Irish law, an appointment as teacher of art education was dependent on passing an examination in Gaelic. The court did not find this to be in breach of regulation 1612/68, not even if the education in question was not given in Gaelic. The relevant regulation fit in the government's policy of promoting the use of the first official language as an expression of national identity and culture. The court stated that "[t]eachers have an essential role to play, not only through the education they provide but also through their participation in the day-to-day life of the school and through their privileged relationship with their pupils. Under those circumstances, it is not unreasonable to require of them a certain knowledge of the first national language." The requirement that they have a reasonable command of such a language must consequently, insofar as the required level of knowledge is not incommensurate with the goal aspired to, be considered a requirement in accordance with the knowledge required due to the nature of the work to be performed in the sense of Article 3, section 1, last paragraph of regulation 1612/68. Nevertheless, according to the Court, what cannot be accepted is: "a rule that the relevant language knowledge must have been acquired in the national territory. Nationals of other Member States must have the opportunity to re-sit the oral examination if they failed it, when they again present their candidacy for a position as assistant teacher or teacher."[101]

Yet, with this judgement, the nuances mentioned above should clearly be discussed. After this pronouncement too, the principle that in a policy promoting language, nothing can take away from the fundamental freedoms, in this case the freedom of workers, remains valid. The established requirements must still be commensurate with the established objective and may not discriminate. Still, the Groener lesson was later established in Article 149 (formerly Article 126) of the Treaty: "The community must, in its policies, respect the 'cultural and linguistic diversity' of the various education systems."[102]

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[100] CoJ., 28 November 1989, 379/87 (Groener), *Jur.* 1989, p.3976.
[101] Groener Judgement, r.o; 20-21 and r.o. 23.

New Developments

It is remarkable that despite the above-mentioned respect for cultural and linguistic diversity, the promotion of language pluralism as one of the objectives of education is brought to the fore. Article 149 (formerly Article 126) of the EC Treaty includes a reference to education in and spreading of the languages of Member States. On the basis of this, the Council is expressly advocating the promotion of language education in the Union.

In an initial resolution, the Council determined that measures could be geared toward improving the quality of the acquisition of and education in languages and toward the diversification of the teaching of and education in living languages in the countries of the European Union.[103] To that end, not only must the principle of an equal statute for all languages of the Union be confirmed, but thought must be given to the tools that could improve education in those languages and the use thereof, so that every citizen has access to the cultural wealth that is anchored in the linguistic diversity of the Union.

In a second resolution, the Council considered that "language education for very young children can be a quality factor in language education and can thus contribute to language pluralism. In the medium term, it can open up the cultural richness rooted in European language pluralism for every citizen. After all, teaching very young children one or more languages other than the native language or languages and the sensitisation for languages at an age at which intellectual flexibility and receptiveness are greatest, can establish the necessary favourable conditions for learning foreign languages at a later age and in that way contribute to reaching the goal of learning two languages of the Union other than their native language(s)."[104]

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[102] VERBRUGGEN, M., supra note 27 p. 166.

[103] Resolution of the Council of 31 March 1995 concerning quality improvement and diversification of language acquisition and language education in the educational systems of the European Union, *Pb*. C207, van 12/08/1995, p. 0001-0005.

[104] Resolution of the Council of 16 December 1997 concerning teaching the languages of the European Union to very young children., *Pb*., C 001 of 03/01/1998 p. 0002-0003.

HIGHER EDUCATION IN GREAT BRITAIN

Dennis J. Farrington

Introduction

This chapter is an introduction to the current structure of higher education in Great Britain[1] and the legal issues there that are currently engaging the attention of university and college administrators. The chapter is intended as a broad overview, as each subject could be developed into a lengthy article in its own right. Higher education is defined by law[2] as being higher certificate, higher diploma, undergraduate or postgraduate degree, teacher training, and courses provided at a higher level in preparation for a qualification provided by a professional body. The definition is required essentially to 'ringfence' the category of student entitled to what are now complex financial support arrangements introduced progressively over the past decades, most recently modified by the Teacher and Higher Education Act 1998, and similarly to exclude categories of students from receiving some social security benefits. Other provisions for post-sixteen students are made by secondary schools and colleges and by further education colleges, the latter tending to concentrate on vocational disciplines, with a variety of access routes available to higher education.

The rate of participation in higher education has increased dramatically in Great Britain from about 5% of the age eighteen cohort in the 1960s to approximately 40% in 2000.[3] In the 1960s, higher education was delivered almost entirely by the forty state-funded universities to school-leaving students receiving generous maintenance grants, paying no tuition, and resident on a full-time basis for three years of three terms of ten weeks or less. Today, higher education is delivered by some 170 institutions including more than 100 university-level institutions, many of them transformed from polytechnics and colleges in 1992. Today's institutions are financially supported in whole or in part by the government or devolution authorities through a variety of funding agencies. There is one entirely privately-funded university, the University of Buckingham, and a number of private non-university providers. Access has been extended to mature students and part-time students, many non-resident, attending on a more flexible basis and, in many instances, benefiting from innovative semester systems, including summer semester programmes. The generous maintenance grants have been almost entirely replaced by loans. Limited tuition fees, with some social protection for those from the poorest socio-economic groups, were introduced from session 1998/99, although plans are to abolish these in Scotland from session 2000/01, replacing up-front tuition fees with a graduate endowment scheme.

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[1] The chapter does not cover Northern Ireland as the remaining part of the United Kingdom.

[2] In England and Wales by section 120(1) and schedule 6 Education Reform Act 1988; in Scotland by section 38 Further and Higher Education (Scotland) Act 1992.

[3] Approaching 50% in Scotland.

The providers now range from some of the oldest universities in Europe, dating from the twelfth century (Oxford and Cambridge), and providing a full range of teaching and research at degree and postgraduate levels through to further education colleges founded in the Twentieth Century, which offer limited higher education, mainly at certificate and diploma (subdegree) level, as part of a comprehensive post-sixteen portfolio. Further education is not discussed beyond this chapter.

Relations with the State

The United Kingdom has no written constitution. The England-Scotland Union is based on the Acts of 1706 and 1707, which could, in theory, be repealed by the Parliament of the United Kingdom. The Scotland Act 1998 and the Wales Act 1998 would be recognised by American constitutional lawyers as bearing some resemblance to constitutions for parts of the otherwise unitary state. The Human Rights Act 1998, which goes into effect on 2 October 2000, ensures certain fundamental rights and freedoms drafted by English lawyers in the immediate post-World War II period, and is ultimately derived from a variety of instruments including the Magna Carta. Apart from that, relationships between the state, the devolution authorities, citizens, and other legal entities are regulated by common law and legislation. Since 1972 this includes legislation with direct effect made by the responsible organs of the European Union.

Public or Private?

All higher education institutions are, or are run by, corporate legal entities, the constitutions of which are provided either in a Royal Charter made under the royal prerogative, a governing instrument made by the Privy Council (in effect the United Kingdom's executive power) under the authority of law (for example, the Education Reform Act 1988, as amended by the Further and Higher Education Act 1992), or a Memorandum and Articles of Association as a limited company under commercial law, the Articles being subject to approval by the Privy Council. All are therefore essentially private legal entities operating within the general public sphere of education but are not directly controlled by the state or devolution authority other than as prescribed in the relevant legislation. In the context of the regulation of private higher education, they are what the Council of Europe describe as "established institutions of a partly private-law character which are in practice already integrated within the national higher education system from the point of view of recognition, funding and, where appropriate, evaluation."[4]

Funding

Public funding for institutional activities related to teaching and research is allocated by the Higher Education Funding Councils for England, Wales, and Scotland, using formulae allocation methodologies based generally on agreed student numbers and on the outcomes of periodic research assessment exercises. The Funding Councils have wide discretion over how they allocate funding and are more open about their policies and practices than their predecessors before 1988, when the transitional Universities Funding Council and Polytechnics and Colleges Funding Council were created. As public bodies, their actions are amenable in some circumstances to judicial review.[5] While the doctrine of parliamentary sovereignty ensures that no court has the authority to strike down primary legislation passed by Parliament,[6] the vast array of secondary legislation made under the general powers contained in Parliamentary statutes may be declared invalid or the exercise of powers under it by Ministers, officials, and statutory bodies may be overturned for unreasonableness. In the only reported case[7], an institution unsuccessfully sought to overturn the research rating allocated to it by the Council, which had a significant effect on its funding.

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[4] Council of Europe Committee of Ministers Recommendation R(97)1.

[5] Judicial review in England is generally available where issues raised are of a public law character.

[6] From 2 October 2000, an appellate court (the Court of Appeal or the House of Lords) may issue a 'declaration of incompatibility' with the European Convention for the Protection of Human Rights and Fundamental Freedoms given effect in English law by the Human Rights Act 1998, and the government is then obliged to consider proposing a change in the law to make it compliant. Legislation passed by the Scottish Parliament is not primary legislation for this purpose and may be declared invalid.

[7] R v. Higher Education Funding Council for England ex p Institute of Dental Surgery [1994] 1 All ER 651.

Ministers' Powers

Ministers have limited powers of direction to the Funding Councils over the way they exercise their powers. Legislation specifically prohibits them from issuing directions about funding for particular institutions or interfering in matters considered to lie squarely within institutional autonomy, such as the admission of students, the design of the teaching curriculum, or the appointment and qualifications of academic staff.[8] In respect of the institutions whose constitutions depend on the exercise of the statutory powers set out in the 1988 and 1992 Acts (not those in receipt of Royal Charters), Ministers have power to designate them as eligible to receive public funding (and to remove such designation, effectively closing them) and to intervene directly in the event of financial mismanagement. Funding Councils contract with institutions through Financial Memoranda and associated Codes of Audit Practice, that prescribe the arrangements for financial control and the rights of access of the Funding Councils and state auditors to institutional books.

EU and ECHR Law

It is clear that publicly-funded institutions are considered 'emanations of the state' for the purpose of the direct applicability of some European Union Directives. It is also likely that they will be considered to be either public or hybrid bodies for the purposes of the application of the Human Rights Act 1998, which, as noted above, after some 50 years of waiting, incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms into UK laws with effect from 2 October 2000.[9] As currently drafted, the Freedom of Information Bill, expected to come into force in 2001, will treat these institutions as "public authorities" for the purpose of public access to the information they hold which is not currently available. This Bill, the Human Rights Act 1998, and the Data Protection Act 1998, which came into force on 1 March 2000, are the three parts of a new approach toward a rights-based legal system in Great Britain, which is expected to lead to sweeping changes in society, well beyond the sphere of higher education. Access rights under the Freedom of Information legislation are, however, likely to be significantly less than those enjoyed in the United States.

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[8] Section 68 Further and Higher Education Act 1992; section 42 Further and Higher Education (Scotland) Act 1992. Note that the powers of Ministers to intervene were extended by the Teaching and Higher Education Act 1998 to allow them to cap tuition fee levels for full-time undergraduate students from the European Economic Area.

[9] From May 1999, in respect to certain actions of the Scottish Executive under the Scotland Act 1998.

Institutional Structure

Apart from Oxford and Cambridge, which are essentially self-governing academic communities, university and college governance structures are based on the model of a single governing body (commonly called the Council or Board of Governors). This governing body is responsible for the finances and other resources that may, according to the constitution, have authority to overturn decisions of the senior academic body (commonly called the Senate or Academic Board).

Role of the Governing Body

In most of the newer constitutions, the role of the governing body is clearly stated to be sovereign. However, in practice, academic authority is delegated to the senior academic body, whereas in some of the older ones the Senate has a fully autonomous role in academic decision-making. The position is complicated by the existence in the older chartered institutions of a body called the Court. This Court had a membership commonly running into the hundreds and representative of a wide range of interests within and outside the institution. To quote one Charter, this Court was the "Supreme Governing Body with absolute power in the University." The Court was established in the Nineteenth Century as the legislative authority, while the Council was created as the executive authority with power to propose legislative changes to the Court.[10] The National Committee of Inquiry into Higher Education (Dearing Report of 1997), while recognising the desirability of having a community-based body to which the institution could relate, advocated changes in the role and functions of the Court to clarify that the Council is in practice the "Supreme Governing Body, etc." The process of effecting this change is under way at a number of institutions but, of course, requires changes to Royal Charters, a process that can take years to complete, as the work of the Privy Council proceeds at an appropriate stately pace.

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[10] The Court, as we now know it, was established following the rapid development of new universities in the industrial North and Midlands of England in the nineteenth century. Benefactors wanted a say in how these institutions were run, and other universities were wary of competition by 'new kids on the block' attracting students by offering lower entrance standards to the detriment of existing institutions. Therefore, the Courts contained (and still contain) representatives of industry and commerce and of other universities.

Membership

The majority of members of Councils or equivalent are independent of the institution; that is, they may neither be students nor staff. They are expected to bring to the institution, rather like non-executive directors of a corporation or a Board of Trustees, their personal expertise and experience relevant to the issues with which the governing body has to deal. Therefore, modern constitutions prescribe that they must appear to the appointing authority, in practice the existing independent members, "to have experience of, and to have shown capacity in, industrial, commercial or employment matters or the practice of any profession." While the older constitutions are not as prescriptive, it is the intention, particularly following the second and fourth reports of the Committee on Standards in Public Life set up by the Major government in the early 1990s, that all such members of governing bodies will be selected by an open and transparent process which demonstrates that appointees are suitably equipped for their role. It is now accepted practice that members will complete a Register of Interests, which details any family or commercial relationship with the institution and any obvious conflict of interests.

A number of institutions have simplified the membership of the Senate or equivalent senior academic body. The automatic right of all (full) professors to membership has disappeared in many institutions as they and their professorial complement have grown in size. Not only does this make the work of this body more manageable, it is a better use of staff resources.

Quality Assurance

National quality assurance systems are a relatively new concept in Great Britain, and their operation is a matter of constant and contentious debate. Basic quality controls have always been built into the teaching and learning process, typically through requirements for the appointment of external examiners and for the approval of courses, syllabi, examination arrangements, and the award of qualifications. These controls are the ultimate responsibility of the Senate or its equivalent, which as already explained in many institutions, is subject to the control of the governing body. Normally, these provisions for quality control may not be changed without the approval of the Privy Council. There is no direct relation between these provisions and the typical Royal Charter object, which provides that the institution may act as it thinks fit. Realistically, of course, it must temper its discretion with the need to ensure that its qualifications are externally recognised.

The Idea of Quality

The Robbins Report of 1963 laid stress on the maintenance of standards as an essential part of the fabric of higher education.[11] Its emphases on "achievement and quality" and "high excellence" have recently been viewed with renewed interest. The terms of reference of the National Committee of Enquiry into Higher Education (the Dearing Report - NCIHE), 1996/97, stated that "standards of degrees and other higher education qualifications should be at least maintained, and assured."[12] As a result of continuing concern about quality in the provision of higher education, universities in existence before 1992 had collectively established the CVCP Academic Audit Unit (AAU), one function of which was "to consider and review universities' mechanisms for monitoring and promoting the academic standards which are necessary for achieving their stated aims and objectives."[13]

Structures for Quality Assurance and Assessment

The Conservative government's White Paper *Higher Education* of May 1991[14] and the subsequent Further and Higher Education Acts 1992 led to the formation of two separate organisational structures with different functions. The Higher Education Quality Council (HEQC), established and funded by the institutions themselves, covered the whole of higher education with similar terms of reference to those of the former CVCP Unit (i.e., concerned with mechanisms). Quality assessment units responsible to and supported by the Funding Councils carried out the statutory duties imposed on the Councils under the Acts in England, Scotland, and Wales (i.e. concerned with quality of provision). It was suggested on a number of occasions since 1992 that the functions should be combined under one authority; this was effected in 1997 by the creation of the Quality Assurance Agency for Higher Education (QAA), which NCIHE envisaged would have a key role in producing clear "threshold" standards for degrees, a national system of external examiners, and codes of practice in every institution.[15]

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[11] Committee on Higher Education (Chairman Lord Robbins) Higher Education Cmnd 2154 paragraph 40.

[12] See Chapter 10, Main Report, National Committee of Inquiry into Higher Education, July 1997.

[13] CVCP, 1990. The concept of Total Quality Care is discussed by R. Barnett in Improving Higher Education SRHE (1992).

[14] Cm 1541.

[15] Recommendations 23-25, Main Report, NCIHE, July 1997.

Legal Basis for QAA Operation

The Secretary of State has power under section 82(2) Further and Higher Education Act of 1992 to direct any two or more of the Funding Councils (including the Scottish Higher Education Funding Council, set up under the separate Further and Higher Education (Scotland) Act of 1992) to make joint provision for "the assessment by a person appointed by them of matters relating to the arrangements made by each institution in Great Britain which is within the higher education sector for maintaining academic standards in the institution." This power is held in reserve in case the institutions themselves are jointly unable to carry out this function.[16] QAA reviews and reports on the mechanisms and structures that individual institutions of higher education have in place to assure themselves of the quality of their own educational provision. HEQC carried out that function by undertaking a cycle of visits to institutions, using panels of senior staff seconded for this purpose, and producing a report which was published: QAA established a series of "continuation audits" as the first cycle ended. The Citizens Charter Initiative (see below) requires institutions to make available details of the last such visit and arrangements for access to the report. HEQC produced a number of papers to assist the process of audit,[17] and QAA is engaged in producing a comprehensive Code of Practice on Quality Assurance, several sections of which had appeared by Spring 2000.[18]

The White Paper *Higher Education* identified two ways in which the quality assessment element of quality assurance could be developed: the identification of relevant performance indicators, including measures of added value,[19] and direct observation of practice by external review. Under the Acts,[20] the Funding Councils are required to secure that provision is made for assessing the quality of education provided in institutions for people whose activities they financially support or are considering supporting.

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[16] House of Lords Official Report vol 534, col 715.

[17] E.g., Improving Institutional Capacity for Self-Regulation (1996); Guidelines on Quality Assurance (1996).

[18] Those dealing with postgraduate students, external examiners, disability, collaborative provision, and complaints and appeals by students.

[19] In the House of Lords the Paymaster-General said 'Higher education institutions educate students, and it is right that performance indicators should include data showing how well they do it.' House of Lords Official Report vol 535 col 678.

[20] Section 70 Further and Higher Education Act 1992; section 39 Further and Higher Education (Scotland) Act 1992.

The Councils are not required to conduct the assessments themselves, but each is required to establish a Quality Assessment Committee (QAC) to give advice on the discharge of this duty and on such other functions as the Council may confer.[21] The independence of the committee is secured by the requirement that the majority of its members must not belong to the Council, and its competence by the requirement that they must have experience of, and have shown capacity in, the provision of higher education. So that those involved are reasonably acceptable to their peers, the Council must have regard to the desirability of such persons being actively involved in higher education or carrying responsibility for it. The Scottish Higher Education Funding Council is required to have regard to provisions in England and Wales: "having regard to" in this context does not imply rigid conformity but, as in the duty imposed on the Secretary of State to have regard to certain matters when appointing the members of the Councils, it is an "obligation on a person under a duty not to overlook the matter."[22]

The assessment process prior to the establishment of QAA was not carried out by the committees. Rather, it was conducted by panels of academics and others, such as Her Majesty's Inspectors, with experience to further and higher education. The initial steps taken in 1993 to implement the quality assessment process were not universally welcomed: Legal action was threatened on the grounds of unfairness, the use of dubious statistics, and the inexperience of inspectors.[23] No action of this kind had actually been taken by the Spring of 2000, although some of the language used in the reports is highly critical. NCIHE called upon QAA to develop a fair and robust system for dealing with complaints relating to educational funding, with Funding Councils enabled to withdraw funding if a complaint is upheld and appropriate remedial action is not forthcoming.[24] That suggestion did not attract government support and remains on the table. QAA has been involved in developing 'benchmarking' in three subjects: history, chemistry, and law.

Students

The relationship between students and institutions has progressively become more consumer-oriented as tuition fees have become payable by a much wider range of students and as the concept of the student contract has been developed.

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[21] There is no restriction on the functions which may be conferred on a QAC, but presumably it is intended that these will be related to quality assurance.

[22] First Scottish Standing Committee Official Report 10 December 1991 col 57.

[23] Report in The Higher 4 June 1993.

[24] Paragraph 84, Main Report, NCIHE, July 1997.

Legal Entitlement to Quality Provision

One key issue in relation to students is the extent to which they are legally entitled to quality in teaching or supervision. This is a difficult area and one in which the courts are only tentatively becoming involved, through actions for breach of an implied contractual term to provide a quality educational service or, less likely, an action based on tort law (delict in Scotland), alleging failure to abide by a reasonably professional standard of care in the delivery of the service. The earliest reference in law reports to the concept of "quality" in higher education is contained in the opinion in 1890 in a case where two medical students were involved in a dispute over the syllabus of a course.[25] In the court's view, students were "entitled . . . to express their dissatisfaction" with the arrangements for tuition.[26]

As in the United States, courts generally prefer to keep out of any debate on the academic judgment of professionals, provided this is reasonably and rationally exercised in accordance with institutional rules. The law finds it difficult to objectively recognise some measurement of quality either through application of common law principles or by using the measurements that are arrived at by the statutory process. Clearly, many institutions hold themselves out as offering a quality product - indeed, in a highly competitive market; it would be the height of folly not to do so. The courts, in a breach of contract claim, would wish to go behind the sales "puff" and examine to what extent institutions are legally bound to provide a quality service and how this can be measured. There have been some cases at a district court level where institutional materials or the provision of facilities have been found to be so defective as to justify the award of compensation, but these are rarely reported. There has been no reported case of a successful suit for educational malpractice in higher education, as tort claims are restricted to cases of physical injury.

The Visitor

A remaining and insurmountable obstacle for lawyers is the existence of the exclusive, medieval, Visitorial jurisdiction, which excludes students from taking any case to the ordinary courts if it concerns an institution's internal rules. This applies to all the older chartered eleemosynary corporations in England and Wales, essentially to all universities in existence before 1992, and to the Oxford and Cambridge Colleges. It is not applicable to Oxford and Cambridge Universities themselves, which are civil corporations, or to the newer statutory corporations. Hence there is the somewhat curious spectacle of a student at one urban university having to go cap in hand (or as some witty commentators say, in doublet and hose) to the Queen in Council, the Duke of Edinburgh, the Archbishop of Canterbury, a member of the House of Lords, or the local Bishop, for redress, whereas a student at another university less than a mile away can go to the local district judge.

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[25] Cadells v. Balfour (1890) 17 R 1138, 1149.

[26] These students were supervised by Dr. Jex-Blake of the 'women into medicine' campaign. As students, Dr. Jex-Blake and her colleagues had failed in their attempts to force Edinburgh University to admit them to the medical lectures essential for their qualification as doctors: Jex-Blake v. Senatus Academicus of the University of Edinburgh (1873) 11 M 784. She qualified elsewhere but, then again, fell foul of the law in the Cadells case.

Jurisdiction is exclusive in the sense that the Visitor's determination on the interpretation of the institution's internal rules may only be challenged by judicial review on limited grounds. It has come under increasing criticism for alleged unfairness, delay, and lack of consistency. Some commentators hold that it cannot survive the implementation of Article 6(1) of the European Convention on Human Rights by the Human Rights Act 1998. It is now largely abolished in countries that previously followed the UK (as in Australia and Canada). Where the Visitor has been retained, the duties are either purely ceremonial or have a regulatory or investigative role that does not extend to hearing individual complaints (as in the Universities Act 1997 of the Republic of Ireland). Although there remain some powerful advocates of the Visitor, at a seminar held in November 1999 to discuss the future of the system, it became clear that it was struggling. The Privy Council Office, the Lord Chancellor's Department, and the church authorities who act as Visitors have seen a large rise in complaints, have no coherent procedures for dealing with them, and find the work a strain on available resources. For example, there is no budget for Visitorial determinations by the Privy Council. It is anticipated that further work will be done during the lead up to 2 October 2000 to find solutions to these problems. Meanwhile, attempts to challenge the extent of the jurisdiction itself,[27] or its exercise by politicians,[28] have been unsuccessful. It is arguable that the rejection of an application for a place at medical school, that turned upon the exercise of internal procedures, should have gone to the Visitor rather than to the ordinary courts.[29]

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[27] R v. University of Nottingham ex p Ktorides [1998] E.L.R. 184 (CA).

[28] R v. Visitor to the University of East Anglia ex p Hanuman [1999] Ed CR 781 (CA).

[29] R v. University College London ex p Idriss [1999] Ed CR 462 (CA).

The Terms of the Student Contract

In examining the legal basis for an action based on failure to deliver a quality product, a lawyer naturally turns to the paperwork. In fact, it is difficult to find a contractual commitment to quality in the Royal Charter or the instrument of government of a typical modern institution. While "attainment of expressed goals" is undoubtedly one general measure of the effectiveness of an institution,[30] institutions are not required by the operation of law to have the "stated aims and objectives," which the CVCP Academic Audit Unit assumed, other than those laid down in their Royal Charters or other instruments of government. Of late, there have been a variety of statements of aims, "mission statements," and statements of intent produced as part of an institution's public relations strategy or accompanying planning statements made to the Funding Council, but probably these are of no legal significance.

A typical 1960s charter defines the relevant object of the University as being "to provide instruction in such branches of learning as the University may think fit, . . . and to make provision for research and for the preservation, advancement, and dissemination of knowledge in such manner as the University may determine,"[31] while a 1997 mission statement included the objective "[to] undertake high quality teaching whilst researching at the highest level,"[32] and the more detailed objectives include "to enhance the quality and effectiveness of teaching and learning [and] . . . to position itself in the top quartile of UK institutions for research as a centre of excellence in both research and teaching." The last statement is the only quantitative, objectively measurable aim, assuming that there is a nationally-agreed way of placing institutions in league tables. "High quality" and "enhanced quality" are relative terms and the latter, in particular, begs the question of the quality present prior to the enhancement. There is an obvious difference between "instruction" in the Charter and "teaching and learning" in the objectives, the latter requiring more than one player.

Standards

Another word in common use, and with possible legal implications, is "standards," defined by the CVCP Academic Audit Unit as "[describing] the levels students are expected to reach in each course and . . . defined by the university in consultation with others." External examiners are used to make sure that standards are even across higher education. It is possible to have high standards but low quality. Of course, an institution does not guarantee that a student enrolled in a particular programme will complete it successfully. Admission implies that, on the evidence available at the time, the student is considered capable of doing the work of the course and is likely to complete it successfully. It is arguably the responsibility of the institution to let the student know if, subsequently, there is reason to believe that he or she will not be successful, so that appropriate action can be taken. There is also an implicit promise to teach effectively, but there are important questions about the criteria of effective teaching and what standard of teaching a court would hold as reasonable to expect in order to discharge the institution's obligations.

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[30] D M Yorke Indicators of Institutional Achievements: Some Theoretical and Empirical Considerations: Higher Education 16-1 (1987).

[31] University of Stirling Charter (1967). Such provisions allowing institutions to do as they wish may possibly run foul of European consumer protection legislation applicable to contracts. See, for example, the Unfair Terms in Consumer Contracts Regulations 1999.

[32] Strategic Plan 1993-98: University of Stirling (1993).

In 1970, the National Union of Students/National Council of Civil Liberties (now Liberty) Report *Academic Freedom and the Law*[33] concluded that students might wish to criticise the teaching of a member of staff with regard to (i) the clarity and coherence of his [sic] exposition; (ii) the relevance of what he teaches to the published syllabus; (iii) his factual accuracy; and (iv) his interpretation of the subject. The standards expected by today's students (of both male and female teachers) are arguably higher, with the emphasis more on the learning process as a whole than on teaching alone. This is so, particularly when students are paying economic or quasi-economic fees, as is the case with overseas students who may also have cultural reasons for high expectations of their own performance or at least of rewards for it. The course and their performance in it are of paramount importance to many students, even if some view the name of the university or college from which they will graduate as more significant. Indeed, while the government effectively caps the fees that can be charged to full-time undergraduate European Economic Area students at £1050 annually (2000/2001 figure), there is considerable discussion among the more prestigious institutions about the possibility of this cap being lifted following the next general election, which may take place in 2001.[34]

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[33] Academic Freedom in Academic Freedom and the Law NUS/NCCL Commission on Academic Freedom and the Law 1970 Chapter 2.

[34] There is no fixed term of a Parliament other than a maximum: the Prime Minister may call a General Election at his/her discretion.

In some cases there is, in addition, a contractual commitment to a third party, such as a governmental agency or an industrial sponsor who expects that the course contracted for will be provided to professional standards.[35] This could be extended by analogy to the authorities who pay students' fees (local education authorities in England and Wales, the Scottish Executive, and the Northern Ireland Education and Library Boards). Renewal of such awards is normally dependent on the institution certifying that the student remains in good academic standing, but the funding bodies have no direct input into quality assurance of the courses that they are partially funding. Ultimately, all such funds are derived from the relevant Education Department, which does, of course, have an input through the Funding Council. The real test comes when students have to pay the fees themselves.

CCI Charters and *Service First*

Another relevant factor is the *Citizen's Charter Initiative - Raising the Standard* (CCI), which was launched in 1991[36] and survived the change of government in 1997. CCI, now *Service First*, is "about giving more power to the citizen...[it is] not a recipe for more state action . . . [it is] a testament of our belief in people's right to be informed and choose for themselves . . . [it] sets out the mechanism for improving choice, equality, value and accountability." It is conceded that not all these apply to every public service, but there is a common objective: "To raise the standard of public services, up to and beyond the best at present available." The main CCI themes are "Quality": a sustained new programme for improving the quality of public services; "Choice": choice, wherever possible between competing providers, is the best spur to quality improvement; "Standards": the citizen must be told what service standards are and be able to act when service is unacceptable; "Value: the citizen is a taxpayer and public services must give value for money within a tax bill the nation can afford.

The principal charters[37] in higher education, issued in the autumn of 1993, were The Charter for Higher Education ("Higher quality and choice"), covering higher education in England, and The Further and Higher Education Charter for Scotland ("Raising the standard"), covering further and higher education in Scotland. Higher education institutions were urged to introduce their own charters, whereas further education institutions were compelled to do so. The Student Charter Project Report commissioned by the Department of Employment[38] defined a charter as "a statement of rights, or rights and responsibilities, between an institution and a group of students: an 'agreed statement' or one imposed by Government or by institutions." This was distinguished from a contract, an agreement between an individual student and the institution, which is intended to be legally binding. Nevertheless, the two are linked. "Agreed statement" charters are not new and predate CCI. The Student Charter Project Report gave examples, tracing the idea at least to the 1940s. A major contribution was made by the NUS/NCCL Report *Academic Freedom and the Law,* referred to above, published when student unrest and dissatisfaction with the education system had peaked.[39] In some cases, the terms of a public service charter issued under CCI have become incorporated into the express terms of contracts - for example, those concerned with standards of service in the privatised utilities and transport undertakings, where compensation is offered if set objectives are not achieved.

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[35] The Contracts (Rights of Third Parties) Act 1999, coming into effect in May 2000, may be of relevance here. Effectively, this allows third parties with an interest to sue on a contract to which they are not a direct party.

[36] Cm 1599, 22 July 1991.

[37] There is an obvious possibility of confusion with Royal Charters.

The report showed that in 1992, across the whole higher education sector, just over half of all institutions were either not interested in or were opposed to the introduction of a student charter, with former polytechnics and the colleges of higher education being more pro-charter than the traditional universities, reflecting perhaps the former public sector's greater familiarity with external monitoring and evaluation of quality. This statistic did not stop government departments from issuing charters in September 1993.[40] Although revisions were mooted at various times, by Spring 2000 the charters issued in 1993 remained unchanged, and there remain a number of institutions that have not adopted their own charters.

The two principal charters are not "student charters," as such, but cover a range of relationships that institutions have with the public at large: potential students and their parents, registered students, employers, sponsors of research or consultancy, and the public who use their facilities, such as the library, sports, cultural, and recreational facilities. However, they are directed primarily at students as the major users of higher education services. The charters have a similar approach to quality issues, although they treat the relationship that gives rise to such questions in very different ways. The English Charter describes the relationship between institutions and their students as a provision of services to customers with the focus on meeting customers' legitimate needs. Failure to provide the high standards required by the charter may have implications in law.[41] As the discussion of quality has shown, reasonably professional standards are probably already implied terms of the contract, so the issue is one of degree.

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[38] B Davey, The Student Charter Project Report, University of Kent (1992).

[39] D Christie, The Legal Basis of Student Tenure at Colleges and Universities in Academic Freedom and the Law NUS/NCCL (1970).

[40] See D J Farrington, (1994) The Higher Education Charters: Implications for Universities and their Staff CVCP/ Universities and Colleges Staff Development Agency.

The term "customers" also extends to employers of graduates, sponsors of research, consultancy, and members of the public wishing to use institutional facilities. The Charter promotes high standards of service in all areas, including teaching, guidance, counseling, and research supervision; as does the Scottish Charter, which avoids the institution-customer terminology, preferring the word "user" to "customer" and describing the "complex" institution-student relationship in terms of a partnership between teachers [sic] and students.

Legal Effect of CCI-Derived Charters

As already mentioned, a number of institutions have issued their own charters, codes of practice, or expressions of intent as to the standard of service that they will offer. Whether these have any legal effect will depend on the extent to which they are expressly, or by implication, the terms of any contract between the student and the institution. One (unidentified) university charter states the responsibilities of students *inter alia* "to arrive punctually at lessons [and to prepare] themselves appropriately for their learning as their course progresses." An example from the further education sector states that students should "refrain from dropping litter." The possibility of confusion between what are expected to be legally binding rights and obligations and expressions of intent is obvious. Research for the *Student Charter Project* discovered fear of litigation if charters were expressed in mandatory or directory language, so that some institutional charters or codes of practice that predated the CCI charters had been 'watered-down' in effect.

It is perhaps easier to compare the impact of the Charters with that of the statutory Codes of Practice issued by the Advisory Conciliation and Arbitration Service, the Equal Opportunities Commissions, and the Commission for Racial Equality. Although these have no specific legal force, they are examples of good practice that courts and tribunals (and no doubt the Visitor) will take into account when determining the reasonableness of employers' and others' behaviour in certain circumstances.

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[41] See J. W. Parlour, (1996) 'Student Charters in Higher Education' Education and the Law 8 (3) 229.

Appeals and Complaints

The final version of the section of the Quality Assurance Agency for Higher Education overall Code of Practice dealing with Student Appeals and Complaints will be published early in 2000, and all institutions will be required to comply with it by early 2001. This section of the Code will specify that institutions must have effective internal procedures for dealing with complaints relating to the provision of educational services and effective mechanisms for the review of academic decisions. As required by the government in its responses to the Dearing and Nolan Committees, an essential feature of the procedures must be an independent external review mechanism.[42]

The introduction of a new external review element in other institutions may eventually reduce the volume of cases finding their way to the courts. In 1998-99, the number of cases reported as reaching the Court of Appeal on renewed applications for leave to apply for judicial review was significantly greater than in previous years. This mirrors the trend in the Visitorial jurisdictions, although the outcome of these cases is rarely reported. Those that are reported are just the tip of the iceberg, as many issues are resolved by informal methods of various kinds or by formal settlement.

Complaints that reached the higher courts in 1999 have been uniformly unsuccessful, usually because aggrieved students sought to challenge the academic judgements of the institutions or their examiners, a line almost certainly doomed to fail, particularly when the students have not exhausted internal procedures.[43] It is clear that institutional judgment about the qualifications of examiners will not normally be questioned.[44] In one case,[45] the application was well out of time, but, in any event, a decision to refuse an academic appeal was not blatantly unfair. Neither were the rules that prevented a student who submitted work late from obtaining a higher class of degree.[46]

In 1998, alternatives to using the courts as a last resort for students were proposed by the Committee of Vice-Chancellors and Principals (CVCP). Its preferred option, compulsory arbitration, has been rejected by almost all the sector, and other options, such as an Ombudsman (as in Canada) and some form of administrative tribunal (as in Australia), have found limited support. The option that appears to be gaining ground is the establishment of one or more panels of independent experts, who would be called upon, as required, to attempt to resolve disputes before court action was contemplated. At least one university already uses an independent expert to try to resolve issues that would otherwise go straight to its Visitor. Development of this proposal is expected during 2000.

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[42] See D. J. Farrington, 'Student Complaints in Higher Education' [1998] Contemporary Issues in Law (Lawtext Publishing) 194.

[43] R v. Liverpool John Moores University ex p Hayes [1998] E.L.R. 261.

[44] R v. Cranfield University ex p Bashir [1999] ELR 317 – a curiosity since Cranfield University has a Royal Charter and therefore a Visitor.

[45] R v. University of Portsmouth ex p Lakareber [1999] E.L.R. 135 (CA).

[46] R v. University of Central England ex p Sandhu (unrep) 9 March 1999 (CA).

Academic Staff

Since the Education Reform Act of 1988 removed the right of access to the Visitor from the academic staff in the older institutions, and changes to internal statutes introduced by Commissioners appointed under the Act removed the protection of all new and newly-promoted staff against redundancy, academic staff in British higher education institutions are assimilated to the ranks of other employees whose employment is protected by the general law.

Protection from Arbitrary Treatment

As in many professions, there are specific rights incorporated into the contract of employment by law and by the terms negotiated with trade unions. Academic staff have always enjoyed a higher protection of their freedom of speech than other citizens, and this protection was preserved in the Education Reform Act.[47] Subsequently, employees generally have received greater protection against dismissal or discipline for so-called "whistleblowing" (the Public Interest Disclosure Act 1998) and, in any event, the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms into British law in October 2000 will improve protection for everyone. Employment law in Great Britain is developing at a rapid pace, largely through the implementation of Directives of the European Union designed to offer greater protection to part-time workers, those on fixed-term contracts, parents, and others with domestic responsibilities and to restrict excessive working hours, grant minimum holiday entitlements, and so on. Decisions of the European Court of Justice and the European Court of Human Rights have widened the categories of protection against discrimination: for example, gender re-assignment,[48] although not yet sexual orientation.[49] So far, there is only a code of practice relating to age discrimination, but undoubtedly, in due course, there will be legal protection.

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[47] Section 202.

[48] Sex Discrimination (Gender Reassignment) Regulations 1999.

[49] Grant v. South West Trains [1998] ICR 449 (ECJ).

Current Issues

Issues of current interest include the ownership of intellectual property (notably with the increasing use of the Internet as a means of communication and distance learning), the structure of the profession (implementation of a national committee report on remuneration systems), and securing equal opportunities, particularly for under-represented groups, including women in senior positions and ethnic minorities generally. In a recent case[50] a female academic challenged the University of Cambridge promotion procedures; the court stayed the proceedings to allow the University to amend them (which it did).

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[50] R v. University of Cambridge ex p Evans [1998] Ed CR 151.

NEW ZEALAND

Paul Rishworth

Introduction

Last year's review of developments in New Zealand's education law sketched the constitutional and legal framework within which primary and secondary education is delivered. This year's entry begins by doing the same for the tertiary sector, which is presently in a period of review and transition. As to primary and secondary education, there has been little action in the courts, although a change of government in the 1999 election has brought important legislative changes.

Tertiary education in New Zealand

New Zealand is a relatively young country, dating from 1840. As in other areas of public life, government in New Zealand was required to take the lead in establishing institutions necessary for its development. In education, this meant establishing publicly-funded universities and technological institutes where a free tertiary education was available; this was the situation until the early 1990s when partial fees were introduced. Fees have steadily crept up, much opposition notwithstanding, but are still modest compared to tuition fees in North America. To date, there are no private universities. Moreover, it is unlikely that any broad spectrum private university could survive if it sought to charge both the full cost of tuition as well as recoup its establishment costs. While the reforms described below have enabled private providers to enter the tertiary education market and receive the government-funded allowance for each enrolled student, they do not draw enough revenue to fund the acquisition of a large asset base. Hence, the private providers of tertiary education tend to be in limited fields such as art and drama.

The current legal regime within which tertiary education institutions (TEIs) operate is the Education Act 1989. That is the same Act whose impact on primary and secondary education was addressed in the *Yearbook* last year. The Act was designed to vest a degree of community control over educational institutions. The governing bodies of TEIs, like schools, were to produce Charters that set out, after community consultation, their educational missions. The Charters were to be approved and enforced by the Secretary of Education. In practice, these Charters turned out to be general and bland, having little that one could disagree with or even remember for very long. The importance of the Charters lay in the symbolic effect of independent councils responding to community concerns, set within a framework of national concerns reflected in those provisions of the Education Act imposing mandatory functions and duties.

The Act recognized four categories of TEI that could be public or private: universities, polytechnics, colleges of education (concerned with teacher training), and wananga (concerned with Maori knowledge). In a back-handed way, the Act set out a partial definition of a university. In a section conferring power on the Minister of Education to formally recognize, and so legally establish, a new TEI, the Act set out the criteria that should guide him in deciding whether a body should be designated a university, polytechnic, college of education, or wananga. The Act says that a university has "all the following characteristics and other tertiary institutions have one or more of [them]:[1]

> They are principally concerned with more advanced learning, the principal aim being to develop intellectual independence;
>
> Their research and teaching are closely interdependent and most of the teaching is done by people who are active in advancing knowledge;
>
> They meet international standards of research and teaching;
>
> They are a repository of knowledge and expertise;
>
> They accept a role as critic and conscience of society."

The Act then gives more specific descriptions of each type of institution. A university, it is said is characterized by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence and promotes community learning.[2]

Merger and Acquisitions in the Tertiary Sector

The above definitions have been the subject of much study. The funding formula for TEIs is driven by EFTS (equivalent full-time students), meaning that institutions need to be able to attract students in sufficient numbers if they are to remain viable. This leads to a certain jockeying for position, both in a geographical sense (establishing branches in other population centers so as to gain access to a larger pool of students, for example) and in a branding sense (as when a polytechnic renamed itself "Unitec" and another sought a formal change in status to a university). Consequently, all TEI managers have had to keep their eyes firmly fixed on their bottom line.

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[1] Section 162(4).

[2] Id.

A related way of gaining EFTS is to acquire or merge with another institution. This, then, generates questions about the status of the merged or acquired institution. If a university acquires a polytechnic, for example, is the whole new enterprise a university? In 1997 and 1998 these questions arose in connection with the planned acquisition by Massey University, operating in Palmerston North and Auckland, of Wellington Polytechnic, operating (as its name suggests) in Wellington. To accomplish that amalgamation, for which there was no specific procedure in the Education Act, Massey proposed that the Minister should disestablish the Polytechnic. Its assets and courses would then have be taken over by, and become part of, the university. The Minister was disposed to agree. However, when another polytechnic brought a legal challenge, a judge granted interim injunctive relief in December 1997, noting that there is a "strong argument with a reasonable chance of success that it was not the intention of the Legislature that the *different types of educational institutions provided for by the Act could be merged* in the way proposed . . . ."[3]

In early 1998 the government introduced legislation pre-empting that litigation. This legislation was tacked on to an unrelated measure and passed under urgency. Designed to "clarify the law," the new provision expressly authorized the amalgamation of TEIs as proposed. This, of course, did "clarify the law" in favor of the enjoined parties and the litigation was subsequently struck out as incapable of success. The amalgamation duly proceeded. The government's speedy law change, without normal consultation processes, was criticized.[4]

On a related note, the long-standing application of the Auckland Institute of Technology to be reclassified as a university was successful during 1999 and came into effect on 1 January 2000. It is now the Auckland University of Technology.

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[3] Manawatu Polytechnic v. Attorney-General High Court, Wellington, 15 December 1997, Doogue, J., emphasis added.

[4] M Taggart, "Déjà vu all over again" [1998] NZLJ 234.

University Governance and the New Public Sector Management

The governing bodies of TEIs, called "Councils," are made up of at least twelve but no more than twenty persons with the government entitled to appoint only four members. The remaining eight to sixteen places are distributed amongst the Chief Executive, academic and general staff, and relevant professional associations. There can be co-opted members as well.

In the years since the 1989 reforms, there has been constant financial pressure on TEIs, especially the universities. Responding to the problem, university administrators have been forced to look for efficiencies. This has led to redundancy for staff in fields that do not bring in sufficient numbers of students and new allocation of resources to the subject areas perceived to be in demand. Since, in the aggregate, students' preferences tend to reflect the perceived attraction of a course to future employers, the overall result is a shift away from courses with no practical market application and toward law and business. When university managers respond to this, the result can seem like pandering to "applied" research and away from pure research in traditional academic fields.

Funding problems have also led managers to streamline the organization of universities through internal "restructuring." Such measures are not, of course, directly forced upon universities by government; but, being a response to funding shortfalls, they might be said to be indirectly so. For its part, however, government has said that it is looking for efficiencies and rationalizations, greater accountability, and research linkages with the private sector that remove some of the burden of funding from the public purse. Clearly, there is no bottomless pit of money available for tertiary education in the modern world.

The dialogue between government and universities has been taking place over the past three years through consultation papers. A *Green Paper* in September 1997 set out the government's ideas on possible options for tertiary reform and sought submissions. Many ideas were floated, one contentious one being the separation of research funding from teaching and making the former contestable among institutions. Another contentious area concerned ownership and governance: government signaled a need to influence governance of TEIs in light of its "ownership interest" in them, especially those at risk of failure and hence financial underwriting. There was the suggestion of levying capital charges on the established institutions. This raised the question: who really owns universities?

Submissions were received, and, in response, a *White Paper* was released by government in November 1998 that maintained the broad themes. As to control and ownership, TEIs would continue to be allowed full control of their assets, but the Council membership would be streamlined to between seven and twelve members. The proposal was that they should be "function focused" rather than "representation focused" – that is, council members would be chosen for their expertise in business management, and members of the institution itself were to be in the minority. This reflected the new public sector management theories that had been applied in other fields but not, to this point, education.

Some minor aspects of the proposed reforms were introduced, but the more radical ones have not been. With a change in government in November 1999 to a center-left coalition, the future progress of these proposals now seems unlikely. Reforms aside, the inability of government to fund universities as they would like them to will continue to mean that universities and other TEIs look for ways to become more efficient.

The Waikato University Litigation

At the height of the debate over the *White Paper*, an important case was brought over structural reforms introduced at the University of Waikato, based in Hamilton, 100 miles south of Auckland. This case served as a symbol for the battle waged between academic traditionalists, on the one hand, and the new breed of university manager, intent on efficiency and rationalization, on the other.

Waikato is a relatively new university located in the heart of a region where Maori are numerically and culturally strong. The university has always had a strong Maori influence; for example, when a new law school was established there in 1990, it stressed, as a special feature, that it would offer an "alternative" legal education, striving to recognize Maori aspirations for change in New Zealand. Yet, Waikato had financial pressures like other institutions and its vice-chancellor, Bryan Gould, proposed a radical restructuring that would, among other things, fold the law school into the Faculty of Management and merge the School of Maori Studies into the Faculty of Education. These were deeply unpopular proposals, and the foundation Dean of Law, along with a Maori studies professor and the national university staff union, brought injunction proceedings.

The case *Association of University Staff v. University of Waikato*[5] came before Hammond, J., in the High Court. Justice Hammond had been, before his judicial appointment, Dean of the Faculty of Law at Auckland University as well as a law professor in Canada and the United States; therefore, he had a keen inside knowledge of university workings. With some eloquence, Hammond, J., noted the conflict between the demands of a free university and the demands of the new managerialism that feels rationalizations are vital to ensure the survival of the institution. As he put it:[6]

> The University is bowing more and more to corporate values, because Parliament says it will have to. The university then becomes a battleground, wherein accountability becomes conflated with accounting. Talk, much of it empty, about "excellence" evades more fundamental questions of values, whilst disguising narrow questions of cost and benefit. On the other hand, plainly something has to give. Everyone knows that the University must be reformed. But what lies at the deep level, behind all of this, is a struggle of the utmost importance which is unfolding over the appropriate knowledge structures for the 21st century.

Hammond, J., went on to uphold the legal challenge to the Vice-Chancellor's (V-C) restructuring proposal. The V-C had, he said, acted unlawfully. The Education Act vested "management" in the V-C as chief executive officer, while "governance" lay with the University Council. Further, he maintained that the Act required the establishment by Councils of an Academic Board to which questions of an academic nature had to be put. Accordingly, he remarked that if the decision to embed the School of Law into Management and Maori studies into Education was an academic one then it was, by law, one that the academic board had to first consider. According to Hammond, J., had Council then approved, the V-C as "manager" could have implemented the decision. However, until that had happened, he wrote that it was beyond the V-C's power to implement restructuring of the faculties.

This case, therefore, turned on characterizing a restructuring as "academic" in nature. In this respect, the V-C, in evidence, was hoisted on his own petard. He apparently "conceded" that there was an "academic rationale" in moving Law into Management: it rested on a view that "law" is moving in the direction of the kinds of matters that are taught in management schools. Hammond, J., agreed that while that may well have been so, there were different views. And therein lay the whole point. As he put it:

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[5] High Court, Hamilton, CP 12/99, 23 March 1999, Hammond, J.

[6] Id., p. 24.

The question of *where* something is taught is no "mere" or "incidental" matter. It is a matter of the greatest academic significance. The structure of courses, how they are taught, what the purpose of the course is perceived to be, how well they will be supported, and so on, turns on a fundamental appreciation of the general philosophy and direction of an academic entity. That explains why (and this often bewilders members of the public) there are so many tiffs within the academy over just such matters.

The case resulted, therefore, in a setback for the management. Although an appeal was filed, it was later withdrawn. The result was a victory for the concept that the notion of an "academic" matter is a broad one that vested power in the university's Academic Board, with whom its Council was bound to consult. Further, it limited the power of management.

The Maori Dimension in Tertiary Education

Maori are New Zealand's indigenous people, making up about 13% of the population. In 1840, the Treaty of Waitangi was made on behalf of Queen Victoria with the chiefs of the majority of Maori tribes. The Treaty forms much of the moral basis of the nation's constitution, given that it legitimized the subsequent exercise of power by the colonial, and later the independent, government. The precise effect of the Treaty is now much debated: did it really transfer the sovereignty of Maori tribes to the English Queen? Or did it instead simply authorize the Queen to exercise her authority over non-Maori in New Zealand, with the Maori retaining their full sovereignty as before? New Zealand's legal history has proceeded on the former basis, but the argument that the latter was, in fact, what was really intended by Maori is not without force. Crucially, the Treaty document itself is genuinely ambiguous. For a start, it is in two versions, Maori and English, and the versions say different things and are not translations of each other. The bottom line is that the Treaty itself cannot really settle this type of issue. When investigating the legal authority of a government, the principle is that even though might not be right, it is certainly what matters most.

That, of course, still leaves the subject of possible constitutional change open for debate. New Zealand has been having this debate in a small way for some years. However, the debate is now growing in urgency and intensity and has been given impetus by the election of the new government, whose Attorney-General has, as a former law academic,[7] written in support of constitutional change to accommodate Maori aspirations. Those aspirations turn out to be far from uniform. Some (but few) would advocate Treaty fundamentalism – a reorganization of the state to reflect what they think the 1840 generation really meant. Others argue for reform of constitutional structures to give Maori more say in legislation and government (perhaps a Senate with equal Maori representation). Still others would say that Maori aspirations are appropriately dealt with through existing structures by devolving to the modern successors of the historic Maori tribes a degree of public power and responsibility for service delivery. This last option happens to some extent already, and the argument is that it can happen even more. Some Maori organizations are bulk-funded to deliver services that would otherwise be a matter for government. This approach is played out in health and social welfare but not yet in education, save to the extent that (as discussed below) tertiary funding effectively operates in this way so far as Maori TEIs are concerned.

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[7] Indeed, the Attorney-General is the very person who was foundation Dean of Law at Waikato and a plaintiff in the case just discussed.

In education, the three principal concerns of Maori have been the preservation of the Maori language, ensuring access by Maori persons to higher education, and the regeneration of Maori knowledge. The attainment of these goals requires, of course, a political will and the associated grants of public money. Yet, there will always be competing demands for public money that prompt governments to insist on accountability. All of this is to say that the extent to which New Zealand's educational structures deliver results for Maori remains a political question. An annual review of education law tends to focus on litigation. However, as in other areas of education law in New Zealand, litigation about Maori education is rare. That said, there has been some, as is noted in the next section and in School Closure and its Impact on Maori.

Funding of Maori Tertiary Institutions

The Education Act 1989 provides for the establishment of wananga, a category of TEI. A wananga is defined as follows (section 162(4) (b) (iv), and translations in parentheses are found in the original):

> A wananga is characterized by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding ahuatanga (Maori tradition) according to tikanga Maori (Maori custom).

Three wananga have been established under this section since 1989. Prior to 1990, wananga existed as private institutions that were not recognized as "established" under the preceding Act. They would, even so, have received some grants for capital works from government. After 1990, capital grants were abolished on the basis that, henceforth, general access to "per student" subsidy entitlements would fund both capital development and tuition expenses. The assumption was that the capital needs of TEIs up to that date would have been met by the ability to access grants prior to 1990. The wananga, now established under the Act, argued that their capital needs had not been properly accommodated under the old or new regimes. Their ability to progress this complaint as one of law for determination by a court was limited. It was a complaint about government policy. But, as Maori institutions, they had access to an alternative dispute resolution method, the Waitangi Tribunal.

The Waitangi Tribunal is a statutory body created by legislation in 1975[8] to hear complaints by Maori persons that the principles of the Treaty of Waitangi have been breached.[9] It may make findings and recommendations only; it is not a court. However, it generally follows a court-like procedure, with the hearing of evidence (albeit with major allowances to facilitate giving evidence of oral history and tradition) and the making of reasoned recommendations. The Tribunal may inquire both into the merits of past land transactions as well as into past, present and proposed governmental policy. Its current chairperson is also a High Court judge.

The wananga contended before the Waitangi Tribunal that they were not only prejudiced by the new tertiary funding allocation system but also that it breached the Treaty. The Tribunal agreed and declared that te reo Maori (Maori language) and matauranga Maori (Maori knowledge) were taonga (treasured possessions). Therefore, they were guaranteed by Article 2 of the Treaty, which provides, in part, that Maori are guaranteed rangatiratanga (chiefly authority) over taonga. Insofar as wananga were the modern means of promoting Maori authority over language and knowledge; they were, said the Tribunal, protected by the Treaty. It followed that the Crown was obliged by the Treaty to protect wananga, especially in light of the failings of past policies in education, which have made their protection all the more urgent. And, having established them, it was obliged to adequately fund them.

This decision reflects the generous "updating" approach to Treaty interpretation that is favored by the Tribunal. To say that wananga as such did not exist in 1840 is beside the point: language and knowledge did, and they were protected by the Treaty. Hence, a modern institution that served to preserve that language and knowledge was also protected. There are interpretative issues here that would no doubt be of interest to American constitutional lawyers, but it is important to appreciate that, in a context where the Tribunal's findings are recommendatory only, the stakes are much lower than in constitutional litigation. The Tribunal is best understood as part of the political process and not as a court.

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[8] The Treaty of Waitangi Act 1975.

[9] The Treaty of Waitangi is not itself cognizable in New Zealand law because of the Anglo-New Zealand rule that treaties have no domestic impact unless incorporated into legislation by Parliament.

The government responded to that report by offering each wananga a lump sum injection of capital development funding. One wananga accepted the amount offered ($5.2 million) as a first installment; another refused $3.4 million offered on the ground that it was insufficient and because the process of unilateral offer, rather than a negotiated settlement, offended the mana (dignity, esteem) of the wananga.

Maori in General Tertiary Education

The *Association of University Staff v. University of Waikato* case described above has had a bearing on the legal recognition of the Maori dimension in universities. The starting position is that the Education Act 1989 imposes on TEI councils a legal obligation to "acknowledge the principles of the Treaty of Waitangi" when carrying out their functions and exercising their powers (section 181(b)). By restructuring the Maori studies department into a larger academic concerns, it is required by the Treaty of Waitangi. The university can also point to a specific statutory duty in this are; for example, the Bill of Rights which allows for "measures. . . to assist or advance persons disadvantaged by discrimination," and the Education Act, which imposes on TEIs a duty to "acknowledge the principles of the Treaty of Waitangi" and encourages "the greatest possible participation." Hammond, J., along with the School of Education, held that it was doubtful that the university had honored the Treaty principles. But he did not have to finally decide that point because the reconstitution of the university departments was unlawful for separate reasons.

Affirmative Action in the Tertiary Sector

The legitimacy of affirmative action and quotas is, of course, a well-litigated issue in the United States. It is not in New Zealand. The New Zealand Bill of Rights Act 1990, which operates as a statutory, rather than constitutional bill of rights, and so cannot invalidate legislation, expressly allows for "measures taken for the purpose of advancing [disadvantaged persons]." This reflects the traditional New Zealand egalitarianism. Affirmative action describes a multitude of possible approaches, but even the most rigid and inflexible quotas is a fixed part of the tertiary education sector. The Faculty of Law at the University of Auckland, for example, has a quota of 32 places for Maori and 13 for Pacific Island applicants, out of 270 places. Generally, the Maori quota is undersubscribed, so that the remaining quota places revert to the general pool. Even so, the position remains that there will be successful quota applicants who have lower grades than unsuccessful general applicants. Therefore, the scene is set every year for a potential case along the lines of *Bakke v University of California*.[10]

Yet, this never happens, and it is not clear that any such case would succeed. The justification for the quota system and other affirmative action is that the university should strive for a constituency that reflects its community, and that it is desirable that there be more legally trained Maori and Pacific Islanders. Another justification is that, independent of those pragmatic concerns, it is required by the Treaty of Waitangi. The University can also point to a specific statutory duty in this area: as well as the Bill of Rights allowing for "measures . . . to assist or advance persons disadvantaged by discrimination," the Education Act imposes on TEIs a duty to "acknowledge the principles of the Treaty of Waitangi" and to "encourage the greatest possible participation."

Affirmative action is thus a relatively unexamined area but likely to be scrutinized at some stage as competition for scarce university places increases. There has been one affirmative action case in which a local fishing company attacked the decision of a polytechnic to offer all places in a fishing course to Maori applicants.[11] (The TEI in that case was responding to the reality of government funding that made it advantageous for the polytechnic to do this.) As it transpired, the TEI did not seek to defend its scheme before the Tribunal. It was duly found to be in breach of the Human Rights Act 1993, a general public and private sector anti-discrimination statute that has a broadly similar savings clause for affirmative action. In the absence of a defense by the TEI, the Tribunal hearing the complaint could not be satisfied that Maori could be, in the words of the statute, "reasonably . . . supposed to need assistance." If nothing else, the case drew attention to the fact that there are three enactments relevant to affirmative action: the Bill of Rights, the Human Rights Act, and the Education Act, all of which say something slightly different.

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[10] 438 US 265 (1978).

[11] Amaltal Fishing Co v. Nelson Polytechnic [1996] NZAR 97.

Academic Freedom for Me but not for Thee

Responding to concerns that the new managerialism in university administration has come at the cost of academic freedom, the Association of University Staff (a union representing general and academic staff at universities and the named plaintiff in the case against Waikato University described above) commissioned a report by Canadian academic and educational consultant Dr. Donald Savage. This report, released in March 2000, identified external and internal threats to academic freedom.[12] According to the report, the external threat lay in the "unprecedented invasion of university autonomy and attack on academic freedom by central government." This invasion downplayed "collegial structures in favor of a managerial approach used by private corporations." In short, the pressures placed on universities, described above, were put in terms of their impact on academic freedom.

Another source of external threat identified was from outside persons or bodies who seek to have a university punish or retaliate against their academic staff for publishing their views. A number of instances were referred to and it was suggested that universities need to defend their staff more. In this regard, the report drew attention to the problems inherent in private sector support of university research. The answers to such problems lay, said the report, in clear and effective procedures to ensure academic control of university research.

As to internal challenges to academic freedom, the report observed that UNESCO's recent policy statement had laid emphasis on "collegial self-government as an essential operational part of academic freedom." It was critical of some aspects of the new managerialism, which insisted on simplistic performance indicators and the "quantification" of the output of the university. The report is to be released in book form in 2000 by a New Zealand publisher, Dunmore Press.

A trivial but revealing incident that raised concerns about academic freedom occurred in March 2000. A Victoria University of Wellington academic (serendipitously named Paul Dunmore) circulated an email message announcing that he was not going to attend a university ceremony to open a new premises because it was to include a Maori ceremony for the lifting of tapu. This he saw as an unwarranted genuflection to superstition and ritual which had no place in a university community. His comments attracted the strong criticism of the Maori Vice-President of AUS. The Vice-President doubted Dunmore's claim that he was not "Maori-bashing" and would similarly object to all types of ritual, Maori or otherwise. This, said the Maori Vice-President, only reflected a "culturally myopic view of what is valid knowledge." So far, no problem: the academic freely made his opinions known and the Maori Vice-President freely replied with his. Of more concern, however, is that the Vice-President of AUS expressed support for a student newspaper's editorial calling for Dunmore to be taken before the university disciplinary committee to explain himself. The Vice-President went on to say the incident emphasized the "urgent need for education of university staff in relation to Treaty issues." Both Dunmore and another academic who supported him publicly were said to have "acted rashly and risked damaging the standing of academic freedom and academia."

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[12] The report was at the time of writing available in summary form on the Association of University Staff website, http://www.aus.ac.nz_/, and the quotations herein are from the executive summary written by Dr Savage. TEIs is driven by EFTS (equivalent full-time students), meaning that institutions need to be able to attract students in sufficient numbers if they are to remain viable. This leads to a certain jockeying for position, both in a geographical sense (establishing branches in other population centers so as to gain access to a larger pool of students, for example) and in a branding sense (as when a polytechnic renamed itself "Unitec" and another sought a formal change in status to a university). Consequently, all TEI managers have had to keep their eyes firmly fixed on their bottom line.

This exchange of views reflects the high value placed in New Zealand circles on tolerance and egalitarianism. It also reminds us that academic freedom comes at a cost. This cost ought not to be the disciplining of a person like Mr Dunmore; on the above facts, the cost must be borne instead by those who would prefer that a Maori ceremony go uncriticized. To their credit, the Victoria University authorities appear to have acted as the AUS's own Academic Freedom Report would suggest that they should. As the executive summary of that report says, real changes in the participation of disadvantaged groups depends more on the investment of resources than on matters such as speech codes.

Primary and Secondary Education

School Closure and Its Impact on Maori

In October 1999, the High Court addressed an important case on the legality of a school closure ordered by the Minister of Education.[13] The Minister may disestablish a school if he is "satisfied" that one ought to be closed. The school in this case was at a rural North Island location, once a prospering sawmilling area, but now sadly bereft of employment opportunities and hence of population. The school was on land that had, in 1901, been gifted to the government by a Maori Chief for educational purposes. The school could take forty pupils, but after years of falling enrollment, had only eight at various levels. The school had also been the subject of a series of critical reports by the Education Review Office, the public authority established by the Education Act 1989 to review the quality of the delivery of education by schools.

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[13] Osborne v. Attorney-General, High Court Hamilton, 4 October 1999, M 198/99, Hammond, J.

In terms of cost, the government funded this school approximately $11,541 per pupil in 1999, compared to the national average of $3,252. In addition, the ongoing maintenance obligation was significant. Moreover, there were two other schools nearby, and the evidence suggested that students could attend either without travelling any further than they did already.

What made this case contentious was that the pupils were Maori and the curriculum was being delivered in a bilingual mode. Indeed, the school received additional Ministry of Education funding under a formula that produced an extra $420 per pupil (justified on the basis that between 51% and 80% of the curriculum was taught in Maori). The school was not, as it might have been under the Act, designated as a Maori immersion school, but nothing prevented its Board of Trustees from orienting the curriculum toward its Maori students in this way. There was no objection to that. The question became whether the Maori dimension to the school justified its being treated differently from other schools in a similar situation.

The school closure procedure required consultation by the Minister with the school's elected Board of Trustees (every state school has one of these under the Education Act). After this consultation took place, the Board was unsatisfied with the outcome. It commenced injunction proceedings claiming that the decision was unlawful: the Minister took into account irrelevant considerations; failed to take into account relevant considerations; "denied the right of an ethnic minority to speak their language" contrary to section 20 of the New Zealand Bill of Rights Act 1990; and closing the school was inconsistent with the obligations of the Crown set forth in the Treaty of Waitangi.

All of these claims failed, and the school was duly closed. Hammond, J., in the High Court stressed that the Minister had all relevant facts before him and that his assessment of their cogency was a matter with which a Court should not interfere. As to the Treaty of Waitangi, the judgment is an important one. It affirms that there is no general legal obligation in the Education Act that the Crown act in accordance with the Treaty of Waitangi. In this respect, the Education Act differs from some other recent enactments that expressly provide that, in their sphere of operation, the Crown is not entitled to act in a manner inconsistent with "the principles of the Treaty of Waitangi." Needless to say, this then requires the courts, in those fields, to develop a jurisprudence about what the principles of the Treaty are. Hammond, J., noted, as last year's *Yearbook* pointed out, that the Maori dimension to education is spelled out in the Act through recognition of kura kaupapa Maori (immersion schools), but that there is no overarching and diffuse obligation in the Education Act that guarantees, as a matter of law, that the Treaty must be adhered to in every instance.

Even if there were such a general obligation to adhere strictly to the Treaty, the reality is that the Treaty itself deals with matters of general principle and so cannot speak with precision on matters such as school closures. Those general principles, articulated in courts' jurisprudence in other fields, include the principle that the Crown must deal with Maori in good faith and not inhibit its capacity to protect Treaty rights. However, Hammond, J., commented that he could not see how the Treaty jurisprudence extended to implying a "right to education in a particular place on the basis of historical and whakapapa links."[14] As the Crown lawyer stated, "any such implication would incur unimaginable practical difficulties."

It is significant that the Crown, through its lawyers, made the concession that "in any decision which touches on a taonga of Maori, such as the Maori language, the proper approach is a precautionary one, to ensure that the Crown does not inhibit its capacity properly to address Treaty principles to the extent that they are relevant."[15] The Crown thereby acknowledged the relevance of Maori language and cultural values to this school closure. Hammond, J., seems to have viewed this concession as super-erogatory. He certainly did not treat it as a basis for scrutinizing the Minister's decision: it was enough that, the relevance of the Treaty obligations being conceded, the Minister could show he had addressed them.

This case exemplifies the limits of law in this field. The consistency of the school closure action with the Treaty of Waitangi was essentially a matter for elected officials. The court's role was to ensure it approached the case in the proper way and here it plainly had. The School's Board of Trustees has complained to the Waitangi Tribunal about this closure, and a judgment by the Tribunal is imminent.

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[14] Whakapapa may be translated "genealogical" in this sentence. The passage is at 17.

[15] Id. at 17.

Other Litigation

Litigation arising out of schools in 1999 was almost entirely devoted to employment disputes between principals or teachers on the one hand, and boards of trustees (their employers) on the other. The principles governing these disputes are no different from those governing employment contracts generally. If an underlying dispute were to arise about, say, the rights of a teacher to freedom of religion or expression in a school context, then the case might generate principles uniquely tailored to education. As it is, the cases tend to be about competence and performance issues, exemplifying no particular aspect of education law.

The year was, in other respects, a quiet one in the courts. There were the usual news stories about educational disputes that generated brief controversy and then died away. One of these is worth noting: a secondary school suspended an Indian girl for refusing to remove a stud in her nose that she claimed was an aspect of her culture. The student and her family complained to the Race Relations Conciliator, a division of the Human Rights Commission established under the Human Rights Act 1993, contending that this was discrimination against her on the ground of her race. The incident was capable of another type of characterization as well: The student's freedom of expression under section 14 of the New Zealand Bill of Rights Act 1990 was infringed as was her right not to be denied the right to enjoy her culture under section 20, which, in turn, reflects Article 27 of the International Covenant on Civil and Political Rights. It is significant that the case was classed as a discrimination issue rather than a freedom issue, for only on that basis could it fall within the Race Relations Conciliator's jurisdiction. The Conciliator is, in effect, a free advocacy service for complainants. It appears that a confidential settlement was reached that reflects the strengths and weaknesses of New Zealand education law. The strength is that a speedy resolution was attained at a relatively low cost. The weakness is that there is no precedent set, leaving schools wondering how the case was resolved and whether they are empowered to adopt rules against personal adornment or about appearance.

New Legislation About Suspension and Exclusion of Students

In July 1999 a new set of rules came into force about the suspension and exclusion of students.[16] These rules are designed to allow more flexibility to principals by retaining the old grounds for disciplinary actions against students resulting in permanent or temporary exclusion from the school and adding additional possible remedies. The new remedies are a "stand down period" for up to five days at a principal's discretion (without reference to the school board) and the ability to make re-entry to the school after suspensions by the board contingent upon a student's performance of conditions related to the resolution of the problems. The new procedures were welcomed by schools and appear to be working well.

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[16] Education Amendment Act (No 2) 1998.

New Legislation Introduced on School Zoning and Enrollments

This has been a contentious issue for many years in secondary and sometimes even primary education. There are some schools in New Zealand with strong reputations where parents are keen to enroll their children. This has long had an impact on residential land values surrounding the popular schools, because each one had a geographic zone within which there were rights of entry.

The 1989 reforms, discussed in last year's *Yearbook*, were designed in part to alter this approach. The reforms revolved around the concept of parent choice in school enrollment, the idea being that any student could go to any state school. The idea was that schools should compete for students, and that this would encourage excellence. A school could turn an applicant down only if it had an approved "enrollment scheme" in place and if it duly applied that scheme by making a decision about that applicant in accordance with the scheme's criteria, which may or may not emphasize geographical proximity to the school. An enrollment scheme could be promulgated only if a school was "overcrowded." Since the popular schools were always oversubscribed, they all were overcrowded and had enrolment schemes. The content of schemes were, in general terms, left to school boards of trustees. Yet, a typical feature was that schemes left a large measure of discretion in deciding whether to admit a student. This quickly exposed schools to the charge that they selected students for their academic and sporting prowess so as to enhance the their school's reputation. This was perceived as unfair to the general pool of applicants, especially when the results were that those students close to a school could not get in while others from further afield did.

Since 1989, various solutions were sought for the issue of students who could not get into their nearest schools. It was a political issue, and some sort of legislative attempt was made to sort it out in late 1998. The new amendment, coming into effect in December 1998, was rather Delphic. It required that enrollment schemes "reflect the desirability of students being able to attend a reasonably convenient school" and that schemes should "enable the Secretary of Education to make reasonable use of the existing network of schools."[17] The peculiar thing about this amendment was the reluctance to actually direct schools to formulate a geographic zone within which students had a right of entry. The reason that the direct approach was avoided was that it would have signaled a complete about-face from the underlying philosophy of the 1989 reforms – to allow choice in school enrollments.

Most schools interpreted the new law as requiring them to develop a so-called "home zone," and so followed the spirit of the new law. Yet, some schools rebelled, in particular Auckland Grammar School, the paradigm example of a school that is overcrowded because of its perceived quality. School officials there declared not a zone but a "sphere of influence" within which there was no absolute right to enrollment but a measure of priority. This stratagem was unpopular with politicians, but they should really have blamed themselves for framing a law that avoided the "zoning" word.

The change of government in November 1999 was accompanied by a promise of further reform and, at the time of this writing, a bill has been introduced. If enacted, this bill will require overcrowded schools to define a "home zone." The bill also provides for "priority groups" from out of the zone to take such places as remain in the school. These groups are applicants by ballot for any special program at the school, siblings of existing and former students, and all other applicants who will be selected within each category, as space allows.

That ballot procedure would remove the dissatisfaction that has surrounded the selection process to date. When schools are free to define their own selection criteria, there will inevitably be unhappiness among disappointed applicants. Further, there seems to be something wrong with publicly-funded schools having a power of choice. The ballot system addresses this, although some might say it generates a philosophical problem of its own. Should life's chances, such as admission to a desirable school, be resolved by arbitrary ballot and so discourage individual effort? There are many cases where the ability of a good school to take a promising pupil from outside its area has served the pupil well. Even so, a perfect scheme is unattainable, and the one now proposed does have some advantages.

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[17] Section 11B Education Act 1989 as introduced by § 5 of the Education Amendment Act (No 2) 1998.

In any event, if enacted, this bill will complete a pendulum swing in education policy about school enrolments. And being a pendulum swing, this area will, no doubt, be ripe for revisiting in a few years time.

Conclusion

1999 can be characterized as a year of relatively minor legislative change and little judicial activity, as the major issues, fought in the political sphere, mostly concerned funding and governance. The year 2000 is likely to take its colour from the policy priorities of the new center-left coalition government that came to power in late 1999. For a start, the employment relations law is being completely re-written in a manner that restores some of the waning power of unions, and this can be expected to have an impact across all sectors of education. There are likely to be developments, too, in the delivery of education to Maori. Next year's *Yearbook* will report on the impact of these reforms.

SOUTH AFRICA

Izak Oosthuizen

Introduction

The post-constitutional era in South Africa witnessed a dramatic rise in educational law activities. Not only did new national and provincial educational legislation see the light, but there was also a sharp rise in litigation. As far as organized educational law is concerned, it is very well cared for by the South African Educational Law and Policy Association (SAELPA) and the Center for Educational Law and Policy (CELP). SAELPA, in association with the European Educational Law Association, has presented annual educational law conferences since 1996.

Recent research has confirmed a shocking ignorance among South African school administrators with regard to educational law-related issues.[1] One of the reasons offered for this phenomenon is a lack of training in education law. However, the demand for training in education law is changing so rapidly that it must be regarded as one of the fastest growing disciplines in South African education.[2] Thus, it is true to say that educational law is at present a well established discipline at a growing number of tertiary institutions in South Africa.

The main aim of this chapter is to focus on recent developments in education law in South Africa and determine the extent to which the relatively new Constitutional culture is snowballing in South African educational practice.

Decentralization of Power

Decentralization of power to all the stakeholders in contemporary South African education has to be regarded as one of the directives for education policy. Section 4(m) of the National Education Policy Act[3] reads as follows:

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[1] Mbatha, L.T. 2000. Delegation of authority by school principals: an Education Law perspective. (RAU: Ph.D thesis).

[2] Interview conducted during 1998 with prof E. Bray of Unisa.

[3] South Africa (Republic). 1996. National Education Policy Act, 27 of 1996. Pretoria: Government Printers.

> The policy contemplated in section 3 shall be directed toward ensuring broad public participation in the development of education policy and the representation of stakeholders in the governance of all aspects of the education system.

A natural consequence of this directive is the role of governing bodies in South African public schools. Section 16(1) of the South African Schools Act[4] declares that the "governance of every public school is vested in its governing body." According to section 23 of the Act, a governing body must be for school governance with representation from the parents of learners of a specific school (which has to constitute the majority of members on the governing body); the school principal; teachers teaching at the school; non-teaching staff members from the school; learners from grades eight to twelve; and accepted members if needed.

During the course of 1999, a number of cases emphasized the nature of decentralized power of a governing body. Two of these cases amplified governing body authority in making recommendations with regard to the appointment of teachers while a third addressed their power to take independent initiatives with regard to business initiatives and money-making ventures in supplementing school resources.

Appointment of Teachers

In *Douglas Hoërskool v. Premier, Noord-Kaap, en andere,*[5] at issue was the appointment of a teacher at Douglas High School. According to section 6 of the Employment of Educators Act,[6] as well as certain regulations, collective agreements, and stipulations in the *Education Gazette,*[7] the procedures to be followed appointing a teacher are as follows:

- Provincial Heads of Education Departments advertize vacancies in the official *Education Gazette* of a particular province.
- Candidates send their applications to the Provincial Education Departments, which confirm whether they meet the minimum requirements for posts.
- The departments forward applications to school governing bodies, which, in their turn, refer them to their interview committees.

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[4] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

[5] Douglas Hoërskool v. Premier, Noord- Kaap, en andere 1999 (4) SA 1131(NC).

[6] South Africa (Republic). 1998. Employment of Educators Act, 76 of 1998. Pretoria: Government Printers.

[7] The *Education Gazettes,* which list the educational vacancies in a province, are regularly published by the various provincial education departments.

- Interview committees compile short lists of at least three names as possible candidates for posts.
- Candidates on shortlists are interviewed by committees and listed in order of preference.
- Governing bodies send their recommendations in the form of short lists to their Education Departments.
- Appointments are made by Provincial Heads. Appointments may only be made in terms of the recommendations set out in the shortlists from governing bodies. Provincial Heads of Education may only decline the recommendation of governing bodies on specified grounds, one of which is that they did not follow correct procedures.

In *Douglas*, when Ms. N applied for a vacancy at Douglas High School, her name was submitted on the list of names that the Education Department forwarded to the school's governing committee. Apart from Ms. N, three other names were submitted. However, only Ms. N complied with the minimum requirements set for the advertised post. Consequently, the interviewing committee did not meet with the unsuitable candidates and returned a short list containing only Ms. N's name. On receiving the short list, the department refused to appoint Ms. N, contending that it would not do so because the governing body had not followed prescribed procedure by failing to conduct interviews with the other three applicants and did not submit at least three names on the short list. The Education Department subsequently claimed that, based on a contravention of procedural guidelines by the governing body of Douglas High School, it was not obliged to appoint Ms. N to the post. The court ruled as follows in favor of the applicant on this point:

- Held, that the guidelines in the Gazette did not require the names of candidates who did not qualify for the post and who did not have the necessary experience to be placed on the shortlist, nor was it necessary to invite such candidates for an interview.
- Held, further, that there was nothing in the prescribed procedure (i.e., in the regulations and the collective agreement) which required that the names of at least three candidates had to appear on the short list. Although the candidates had to appear in order of preference on the short list, there was no provision which required that the name of a candidate who did not comply with the requirements of the post had to appear on the short list. There could be no question of any preference if a candidate did not qualify. Such a candidate was automatically excluded.
- Held, further, in respect of the submission that the Court was at best able to issue a mandamus, that the head of the department had neglected to make the appointment (for the vacant post in casu) within a reasonable time.

The court also made the point that the functionaries of the Education Department exhibited such "incompetence and ineptness" that any further delay in referring it back to them to appoint the candidate (Ms. N) would "lead to unjustifiable prejudice" of the school and its learners. The court was thus obliged to substitute its own judgment for that of the department and appointed Ms. N to the post.

In *High School Carnarvon and another v. MEC for Education, Training, Arts and Culture of Northern Cape Provincial Government and another,*[8] there were three schools in the town of Carnarvon. Two of the schools were stretched to capacity and had to share facilities. The third, Carnavan High School, an applicant in this litigation, had the capacity for 540 learners but had an actual total of 250. Until the time of the litigation, there was talk of an amalgamation of schools in Carnarvon. Yet, in reality it was only "a matter of speculation."[9]

In January 1998, the previous principal of Carnarvon High School took a new post elsewhere. The deputy principal, Mr. Prins, acted as principal pending the appointment of a new principal. The post of principal was advertised in the *Education Gazette* in January 1999. Correct procedures were followed, and, after the prescribed interview, the governing body recommended Mr. Prins for the job in April 1999. Rather than appoint Mr. Prins to the post, the Education Department replied that it would not act until such a time as the amalgamation of schools in Carnarvon was addressed. The applicants, Carnarvon High School and its Governing Body, referred to section 6(3)(b) of the Employment of Educators Act,[10] contending that the Education Department was compelled to appoint Mr. Prins because there was no legitimate basis to decline the recommendation. According to section 6(3)(b) of the Act, a Provincial Education Department is compelled to make appointments in accordance with the recommendation of a governing body. The five exceptions to this imperative are listed in section 3(b)(i)-(v) of the Act:

The Head of Department may only decline the recommendation of the governing body of the public school or the council of the further education and training institution, if -

(i) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer has not been followed;

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[8] High School Carnarvon and another v. MEC for Education, Training, Arts and Culture of Northern Cape Provincial Government and another 1999 (4) SA (NC).

[9] *Id.* at 16.

[10] Employment of Educators Act, 76 of 1998. Pretoria: Government Printers.

(ii) the candidate does not comply with any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer;

(iii) the candidate is not registered, or does not qualify for registration, as an educator with the South African Council for Educators;

(iv) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, was based on undue influence; or

(v) sufficient proof exists that the recommendation of the said governing body or council, as the case may be, did not have regard to the democratic values and principles referred to in section 7(1).

The court held that the possibility of amalgamation of schools was not one of the exceptions listed in the Act. The court added that although a public authority, such as the Education Department, is vested with discretionary power, it does not have the right to act as it pleases; discretionary power is empowered and at the same time limited by empowering legislation. The court found that in *Carnarvon* the Education Department acted beyond the boundaries of its power:

The statute's use of the word "only" shows that the first respondent[11] may only decline the recommendation if it fails to meet one of the stipulated requirements, and not on any other grounds. If the requirements are met, then the First Respondent is obliged to accept the recommendation.

Consequently the court ordered as follows: the decision of the second respondent[12] to decline the recommendation of the second applicant,[13] namely to appoint Mr. CA Prins as principal of the first applicant be and is hereby set aside. The first[14] and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application.

As a result of *Douglas* and *Carnarvon*, the court confirmed the decentralized power vested in governing bodies. At the same time, the court is not likely to tolerate ineptness in the educational system when it is to the disadvantage of the learners and a school's organization and administration. Subsequently, it is interesting to note that the South African Schools Act[15] was amended to the extent defined in Section 12A(1). It reads that

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[11] The first respondent, cited in her representative capacity, was the Member of the Executive Council for Education in the Northern Cape Province.

[12] The Head of the Department of Education in the Northern Cape Province.

[13] The governing body of Carnarvon High School.

[14] Member of the Executive Council for Education in the Northern Cape Province.

[15] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

Members of the Executive Council for Education in a province "may by notice in the Provincial Gazette, merge two or more public schools into a single school."[16] In addition, Section 15 now limits the time for educator appointments by specifying that governing body recommendations shall be made "within two months from the day on which a governing body or council was requested to make a recommendation, failing which the Head of Department may make an appointment without such recommendation."[17]

Commercial Enterprise

One of the explicit purposes of the South African Schools Act is to provide a uniform system for the organization, governance, and funding of public and independent schools in South Africa.[18] Section 37 of this Act stipulates, *inter alia*, that a governing body must establish a school fund in the name of a school; open a school fund banking account and administer it on behalf of the school; see to it that all money, contributions, and donations are paid into the school fund account; make sure that all assets acquired by a public school are the property of that school; and ensure that the school fund is to be used for the educational purposes of the school and the performance of the governing body's functions.

In *Die Ferdinand Postma Hoërskool v. Die Stadsraad van Potchefstroom*,[19] at issue was the interpretation and practicable implications of section 36 of the South African Schools Act a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.

The applicant, Ferdinand Postma High School, obtained permission from the Education Department to add the two extra subjects of Hotel Management and Catering to its curriculum. The objectives of the subjects are to prepare learners for careers in hotel management and/or the catering industry. Included in the syllabi of the subjects is a period of practical training at a licensed restaurant. The school reached an agreement with MacRib Restaurant in the town of Potchefstroom to become a concession holder of the restaurant. Consequently, the restaurant moved from its premises in the center of town and opened in one of the school's hostels The restaurant operated on the basis of a commercial enterprise and part of its profit was regularly deposited in the school fund. The first respondent, the city council of Potchefstroom, informed the school that the restaurant could not operate on the school's premises since it was only zoned "educational." While the respondent was of the opinion that since the restaurant was a commercial enterprise and could not be operated on school premises, the applicant maintained that the operation of the restaurant was within the boundaries of the requirement for the curricula of Hotel Management and Catering, and that its activities should have been seen as part of "teaching."

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[16] South Africa (Republic). 1999. Education Laws Amendment Act, 48 of 1999. Pretoria: Government Printers.

[17] *Id.*

[18] The preamble to the South African Schools Act, 84 of 1996.

[19] Die Ferdinand Postma Hoërskool v. Die Stadsraad van Potchefstroom (1999) 3 SA 623(T). Translated it reads as follows: The Ferdinand Postma High School v. The City Council of Potchefstroom.

The first respondent informed the applicant during February 1999, that the operation of the restaurant was unlawful because it was not correctly zoned, and that the restaurant should have been closed. The applicant applied for an interim order, which would have allowed the restaurant to operate until such time as an application for rezoning was filed and accepted. The respondent was not happy with this and filed a counter application for an interdict, which would have stopped the applicant from operating the restaurant on the school premises until the rezoning application was successful.

The court ordered as follows:

> The Act[20] did not restrict the commercial activities that a school could pursue to obtain funds. The operation of a commercial enterprise by a school to enable it to use the earnings therefrom to improve the standard of education it offers, was not only allowed, but was encouraged by the legislature. These commercial activities need not be restricted to those having an educational purpose.

The court granted the interdict applied for by the City Council of Potchefstroom, which prevented the applicant from operating the restaurant as a commercial enterprise on school premises. However, the interdict was suspended pending a successful application by the high school for a rezoning of its premises to accommodate the commercial enterprise of a restaurant.

One of the contentious points of argumentation was vested in the amplification of the concept "education."[21] Judge Bertelsman was of the opinion that it was difficult to describe the operation of a commercial restaurant, that was open seven days a week, every evening until 22h00 and had a liquor license, as a primarily educational activity. Adversative to this position, one could very well make the statement that the concept of education needs to be seen as most pliable. What can be seen as "educational activity" in one situation may not be necessarily so in another. The argument could be raised here that the concept "educational activity" was amplified by the curricula and syllabi of the subjects of Hotel Management and Catering that required a period of training in a licensed restaurant. Therefore, for the purposes of this case, "educational" activity could very well have included working in a restaurant. As far as "the seven days a week, every evening until 22h00" is concerned, it could be argued that education cannot be bogged down by time or locality. Van der Walt, a well known South African educational philosopher, confirms this in his statement that education is not limited by time or space, but that it can take place irrespective of both.[22]

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[20] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

[21] The premises of the High School was zoned for "education" purposes by the City Council of Potchefstroom.

There are two key implications in *Ferdinand Postma*. First, the court confirmed the decentralization of governing body power in the field of business enterprises. In other words, the court was satisfied that a governing body may take measures to promote commercial enterprises on school premises to supplement financial resources supplied by the state, thereby ensuring the improvement in the quality education provided by the state. Second, subsequent to *Ferdinand Postma*, section 60 of the South African Schools Act [23] was amended[24] to protect the Education Department against damages that arise due to school's business enterprise: . . . the State is not liable for any damage or loss caused as a result of any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school . . .

Religion At School

In *Wittman v. Deutscher Schulverein, Pretoria and others,*[25] Mrs. Wittmann, the mother of a minor named Tanya, sued her child's German private school in Pretoria. The school received a large portion of its budget, including the teacher salaries, from the German government. School policy dictated that no student, regardless of his or her religious viewpoint and/or his or her affiliation, was obliged to attend religious instruction classes. On her admission to the school, Tanya's parents signed a form accepting the policy and rules of the school. However, eventually the mother objected to Tanya's attending religious instruction classes and wrote a letter to school officials requesting that she be excused from religious instruction and morning prayers because the Lutheran-based religious instruction was not in line with her views as a guardian. The school board refused to exempt Tanya from either morning prayers or religious instruction classes.

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[22] Interview conducted with Van der Walt, J.L. October 1999. Potchefstroom.

[23] South Africa (Republic). 1996. South African Schools Act, 84 of 1996. Pretoria: Government Printers.

[24] South Africa (Republic). 1999. Education Laws Amendment Act, 48 of 1999. Pretoria: Government Printers.

[25] Wittman v. Deutscher Schulverein, Pretoria and others 1988(4) SA 423 (T).

Mrs. Wittmann took the matter to court contending that to compel Tanya to attend religious instruction classes and school assembly or prayers was unconstitutional. As such, she applied for a court order excusing Tanya from attendance under Section 14[26] of the interim[27] Constitution of South Africa, which dealt with issues such as freedom of religion, belief, and opinion. One of the first issues the court had to resolve was the effect of the interim Constitution on the relationship between church and state. The court held that the provisions of the interim Constitution on religious issues differed from that of the United States in that its contents were not comparable to the Establishment Clause of the American First Amendment:

> It is clear therefore that the drafters of our Constitution steered our constitution ship on a religious course diametrically opposed to that of the United States. This is not surprising. Our country has a long history of religious observance in public of all sectors of our population.

Another issue that had to be resolved was the amplification of the concepts of religious observance and instruction against the background of section 14 (2) of the interim Constitution. Although the interim Constitution (as well as the final Constitution) say nothing about religious education, this amplification in *Wittmann* was of great importance.

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[26] South Africa (Republic). 1993. The Interim Constitution of the Republic of South Africa, 200 of 1993. Pretoria: Government Printers. Section 14 reads: "(1) Every person shall have the right to freedom of conscience, religion, thought, belief, and opinion, which shall include academic freedom. (2) Without derogating from the generality of Ss(1), religious observances may be conducted at state or state aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."

[27] Due to considerations such as the date of summons (23 May 1995) etc., which fellwithin the period of operation of the interim Constitution, the court held that the interim Constitution should be utilised as the basis to resolve the issues in contention.

In rejecting the mother's claim, the court held that religious observance is an act of a religious character, a rite, and that the daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message and benediction) is such an observance. The court added that religious education is not a religious observance. That is, while the interim Constitution and Constitution provide for religious observances, both are silent about religious instruction in state and state-aided institutions. However, the court pointed out that neither a Bible period nor study of the Koran is forbidden.

Another key matter that the court examined was the concept state-aid. At issue here was whether the German school was to be regarded as a state-aided school. The applicant contended that although the German school was a private school, (its annual government subsidy amounted to between one and 1.5 rand *per annum)*, it should have been classified as a state-aided institution. If the school had been classified as state-aided, section 14(2) would have applied to determine that attendance at religious observances must to be "free and voluntary." The court ruled that the school was not state-aided because it was officially registered as a private school in terms of the applicable legislation, that the state was not effectively in control of the school, and that the school was not "an executive organ of the State."

The court acknowledged that section 32(c)[28] of the interim[29] Constitution guarantees the freedom of association, including the right to establish educational institutions based on common values. However, the court noted that the plaintiff subjected herself to the school's policy and rules when she enrolled her daughter at the school, and that the right to exclusivity on the grounds of culture, language, or religion includes the right to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity. In respect of these educational institutions, the fundamental freedom of religion for outsiders is limited to the freedom of non-joinder. Outsiders cannot join on their own terms, and, once they have joined, cannot impose their own terms. This approach to freedom of association is confirmed by section 17 of the interim Constitution (and section 18 of the final Constitution):

> freedom of association entails the right with others to exclude non-conformists. It also includes the right to require

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[28] Section 32(c) of the interim Constitution stipulates as follows: "every person shall have the right to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

[29] South Africa (Republic). 1993. Interim Constitution of the Republic of South Africa, 200 of 1993. Pretoria: Government Printers.

> those who join the association to conform with its principles and rules.

In an effort to define religion, the court decreed that it is not a neutral concept. Rather, the court observed that religion is a subjective concept that is to be seen in the light of a recognition and worship of a personal God, and that, as such, it has no room for the concepts of atheism and agnosticism. The court went on to write:

> The concept 'religion' when used in section 14 of the interim Constitution and section 15 of the Constitution is not neutral. It is loaded with subjectivity. It is a particular of faith and worship. It is the human recognition of superhuman controlling power and especially of personal God or gods entitled to obedience and worship (The Concise Oxford Dictionary). It cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion. Remarks in the United States constitutional case law which tend to describe atheism as religion are in our context inapplicable.

Wittmann raises five significant implications for religion in South African schools. First, unlike the United States, there is no "wall of separation" between church and state in South Africa. Second, religion is not to be regarded as a neutral concept but as one loaded with subjectivity that has no room for atheism and agnosticism; it is to be regarded as the human recognition of a personal, superhuman, controlling God (or gods) who are worthy of human obedience and worship. Third, there is a major differentiation between the concepts of religious instruction and religious observance. Fourth, an amplification of the concept "state-aided" by the court, indicates that South African schools, which are generally referred to and per legislation are defined as public schools, are to be classified as state-aided institutions.[30] Fifth, in terms of section 17 of the interim Constitution (and 18 of the final Constitution), everyone has a right to freedom of association. This means that a private school can be based on a specific religious character that can be enforced on the associates to a degree.

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[30] Oosthuizen, I.J. 1999. Die reg op godsdiensvryheid in Suid-Afrikaanse openbare skole. Paper submitted for the course LLB 325. Potchefstroom.

Corporal Punishment

In the interim Constitution promulgated in 1993, the relevant sections with regard to corporal punishment were sections 10 and 11.[31]

In *State v. Williams,*[32] the Constitutional Court had to determine whether the infliction of corporal punishment as a sentence on a juvenile was constitutional. Judge Langa held that juvenile whipping was unconstitutional because section 10 of the Interim Constitution guarantees each person "the right for and protection of his dignity." The proposition advanced was that the circumstances under which juvenile whipping is administered, including the intentional infliction of physical pain on the juvenile by a stranger, is incompatible with respect for and the protection of the dignity of the person being punished. The court thus found that corporal punishment should be regarded as inconsistent with section 11 of the interim Constitution.

The concurring stipulations regarding dignity and security of the person were taken up in sections 10 and 12 of the Final Constitution.[33] Moreover, although *Williams* had a bearing on juvenile whipping as a sentence, it was generally agreed that it had a strong influence on educational legislation in the form of the South African Schools Act of 1996. Section 10(1) and (2) of the South African Schools Act prohibit corporal punishment as follows:

(1) No person may administer corporal punishment at a school to a learner.

(2) Any person who contravenes subsection (1) is guilty of an offense and liable on conviction to a sentence which could be imposed for assault.

At issue in *Christian Education SA v. Minister of Education of the Government of the Republic of South Africa*[34] was the administering of corporal punishment to students in independent schools where parents have consented to its use. The applicant, Christian Schools South Africa, representing 196 independent (private) schools, contended that section 10 of the South African Schools Act was unconstitutional with regard to corporal punishment in an independent school. Moreover, the school argued that the law was especially inapplicable in a Christian private school because corporal punishment is a "vital element of the Christian religion."[35] The court rejected the school's argument and ruled that corporal punishment in an independent Christian school is unconstitutional even when the parents gave their consent for it in advance.

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[31] Sections 10 of the interim Constitution, 200 of 1993 stipulates that: "Every person shall have the right to respect for and protection of his or her dignity." Sections 11 (1) and (2) determine as follows: "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial. (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[32] State v. Williams and others 1995(3) SA 632 (CC).

[33] South Africa (Republic). 1996. Constitution of the Republic of South Africa, 108 of 1996. Pretoria: Government Printers. Section 10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected." Section 12(1)(e) reads: "Everyone has the right to freedom and security of the person, which includes the right not be treated or punished in a cruel, inhuman or degrading way."

[34] Christian Education SA v. Minister of Education of the Government of the Republic of South Africa 1999 (3) SA (SE) 605.

One might ask whether the infliction of corporal punishment by a police official to the juvenile criminal offender can indeed be equated to its administration by a school principal to a student. In other words, can the *ratio decedendi* of *Williams* automatically be applied to the facts in *Christian Education v. Minister of Education*? This is an important question, especially since Judge Langa in *Williams* argued that the issue under contention was not that of corporal punishment at school:

> . . . the subject of corporal punishment in schools is not before us. Suffice it to point out that the European Court in *Costello-Roberts v. United Kingdom* seemed to attach some importance to the difference between strokes inflicted by a policeman as a result of a court order, on the one hand, and corporal punishment administered by a headmaster in terms of disciplinary rules in force within the school in which the youth was a boarder.

It can also be argued that the relationship between a police official and a juvenile offender differs in many respects from the one between a principal and a transgressing student. Some of the issues that qualify the differences in relationship are embedded in the *in loco parentis* position of a teacher (or principal). This immediately speaks of a common law relationship that exists between a teacher and student while there is no such relationship between a police official and juvenile offender. Two of the fundamental characteristics of the *in loco parentis* relationship between student and teacher are those of mutual trust between the student and teacher[36] and the teacher's responsibility of physical and mental care towards the student.

Based on this line of thinking, one must conclude that the *in loco parentis* position of a teacher has to have a different effect on the motive for administering corporal punishment. One of the strongest motives behind official police punishment is retribution.[37] Conversely, in terms of his or her position as acting *in loco parentis*, a teacher's driving force has to be one of protection and security for the student and the learning environment. Against this background it seems as if it might be a wrong approach to equate the administering corporal punishment to a juvenile offender to that of administering corporal punishment by a school principal to a transgressing student. Nevertheless, as for now, the most important aspect of this case lies in the fact that corporal punishment at school and in private schools was struck down as unconstitutional - even with parental consent.

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[35] *Id.* at 609.

[36] Bondesio, M.J. & Beckmann, J.L. & Oosthuizen, I.J. & Prinsloo, J.G. & Van Wyk, J.G. 1989. The teaching profession: legal requirements. Pretoria: J.P. van der Walt at 38.

Conclusion

The rights, basic values, and principles of the relatively new South African Constitution are gradually finding their way onto the South African educational scene. It might be true to suggest that the present emphasis on decentralization of power is an example of the manifestation of a constitutional value such as democracy.[38] In addition, it may be true to suggest that the court confirmed the impact thereof in educational practice in *Douglas, Carnarvon,* and *Ferdinand Postma*. It is also of interest to note that subsequent 1999 educational legislation[39] supported this trend.

Wittmann was directly linked to provisions in the Bill of Rights and amplified aspects thereof, such as the right to freedom of religion and freedom of association in schools. In *Christian Education,* aspects came under the spotlight such as the right to human dignity and the right to bodily and physical integrity. Ultimately, it is still early days as far as the amplification of constitutional rights and values in South African education are concerned. Thus, while there is a long way to go, every oak tree starts its life as an acorn.

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[37] Many of the South African philosophers of law see the onticity (the essence) of law to be that of retribution: Van Zyl, F.J & Van der Vyver, J.D. 1982. Inleiding tot die regswetenskap. Durban: Butterworth at 100.

[38] The South African Constitution determines as follows: Section 1: "South Africa is one sovereign, democratic state . . .", Section 7(1): " This Bill of Rights is a cornerstone of democracy in South Africa." Section 36(1): "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society . . . "

[39] South Africa (Republic). 1999. Educational Laws Amendment Act, 48 of 1999. Pretoria: Government Printers.

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